Supreme Court, U.S.
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No. 05-

IN THE
Supreme Court of the United States

DON HAMRICK, U.S. MERCHANT SEAMAN
5860 Wilburn Road
Wilburn, AR 72179

PETITIONER

v.

PRESIDENT GEORGE W. BUSH, et al

RESPONDENTS

On Petition For Writ of Certiorari To The U.S. Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

Don Hamrick, Petitioner, *Pro Se*
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QUESTIONS PRESENTED FOR REVIEW

A. THE SCOPE OF THE SECOND AMENDMENT AS AN INDIVIDUAL RIGHT

Whether the scope of the Second Amendment as an individual right (avoided by the U.S. Department of Justice in their Memorandum Opinion for the Attorney General, titled, *WHETHER THE SECOND AMENDMENT SECURES AN INDIVIDUAL RIGHT*, dated August 24, 2004, but nevertheless determined it to be an individual right) extends that individual right to be openly armed (holstered sidearm) in intrastate and interstate travel, whether licensed or not.

Whether the U.S. Department of Justice's Memorandum Opinion on the Second Amendment provides the basis to overturn Judge Ellen Segal Huvelle of the U.S. District Court for the District of Columbia's dismissal with prejudice of Petitioner's Case Nos. 02-1434 (Constitutional Tort Claims for Damages) and 02-1435 (Writ of Mandamus); and Judge Reggie B. Walton of the same court's dismissal with prejudice of Petitioner's RICO Act Case No. 03-2160

Whether the Second, Ninth, and Tenth Amendment must now be incorporated with the rest of the Bill of Rights through the Fourteenth Amendment as binding upon the States.

Whether the *"United States"* being omitted in the second sentence of Section 1 of the Fourteenth Amendment gives the United States government the power to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States or shall deprive any person of life, liberty, or property, without due process of law or deny to any

person within its jurisdiction the equal protection of the laws.

B. STARE DECISIS BASED ON *UNITED STATES* V. *MILLER* 307 U.S. 174 (1939).

Whether stare decisis based on *Miller* must now be abandoned.

C. THE U.S. MERCHANT SEAMAN & THE SECOND AMENDMENT

Whether 33 CFR § 104.220 imposes an unacceptable risk of injury or death for unarmed crew members performing security duties in accordance with the International Ship & Port Security (ISPS) Code, Safety of Life at Sea (SOLAS) XI-2, and the Maritime Transportation Security Act (MTSA) 2002 and whether such crew members must be armed in the performance of such security duties.

Whether the following laws compel the Coast Guard to issue the Petitioner the requested *NATIONAL OPEN CARRY HANDGUN OR SMALL ARMS AND LIGHT WEAPONS* endorsement on his *MERCHANT MARINER'S DOCUMENT* (MMD) when the Able Seaman is required by U.S. Government regulations to attend small arms training as a prerequisite for employment aboard U.S. Government vessels in accordance with 46 U.S.C. § 7306(a)(3) and that Able Seaman is not a prohibited person from owning or possessing firearms under 18 U.S.C. § 922(g), *et seq.*:

(1) Section 611 of the *COAST GUARD AND MARITIME TRANSPORTATION ACT OF 2004* (Public Law No. 108-293, August 9, 2004), authorizing and establishing the *MERCHANT MARINERS DOCUMENTS PILOT PROGRAM* which states: "The Secretary of the department in which the Coast

Guard is operating may conduct a pilot program to demonstrate methods to improve processes and procedures for issuing merchant mariners' documents.";

(2) Section 217 of that same Act adds new Subsection (y) to 14 U.S.C. § 93 for "General Powers of the Commandant" which states: "after informing the Secretary, make such recommendations to the Congress relating to the Coast Guard as the Commandant considers appropriate.";

(3) *PAPERWORK REDUCTION ACT*, 44 U.S.C. § 3501, et seq.;

(4) OPNAVINST 3591.1C *SMALL ARMS TRAINING AND QUALIFICATION*;

(5) ATF Form 4473 *FIREARMS TRANSACTION RECORD*;

(6) *THE OATH OF OFFICE FORM* CG-9556 (Rev. 6-04).

D. GOVERNMENT RACKETEERING AND THE SECOND AMENDMENT.

Whether U.S. Supreme Court committed extortion under 18 U.S.C. § 872 as a predicate act of "racketeering activity" under the RICO Act under 18 U.S.C. § 1961(1) and whether the Supreme Court violated its own Rule 40(2) in addition to violating the Seamen's Suit law, 28 U.S.C. § 1916 by requiring the Petitioner to pay the Court's filing fee as a condition before accepting Petitioner's Petition for Writ of Certiorari as filed.

Whether the U.S. Court of Appeals for the DC Circuit committed extortion under 18 U.S.C. § 872 as a

predicate act of "racketeering activity" under the RICO Act under 18 U.S.C. § 1961(1) and whether the DC Circuit violated the Seamen's Suit law by requiring the Petitioner to pay their filing fee before the DC Circuit would accept Petitioner's appeals.

Whether PACER fees are exempt from payment by U.S. seamen under 28 U.S.C. § 1916. And whether the federal courts must inform PACER of the exemption on motion to the court or whether PACER must comply with 28 U.S.C. § 1916 on its own accord upon presentment of a U.S. Merchant Mariner's Document or copy thereof as proof of identity as a seaman by the Plaintiff/Petitioner.

E. The Second Amendment v. International Treaties & Conventions

Whether treaties with or conventions of the *U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects* and the *Programme of Action* resulting thereof in conjunction with the U.N. Department of Disarmament Affairs' *Disarmament Agenda for the 21st Century* (DDA Occasional Papers No. 6, October 2002) and in conjunction with the U.N.'s International Maritime Organization's Maritime Safety Committee's *Piracy and Armed Robbery Against Ships: Guidance to Shipowners and Ship Operators on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships* (MSC/Circ.623/Rev.3 dated May 29, 2002)'s anti-gun recommendations in paragraphs 45 and 46 can rule supreme over, even though repugnant to, the United States Constitution and its Second Amendment threatening to deny U.S. merchant seamen their Second Amendment right keep and bear arms in the United States.

LIST OF PARTIES

PETITIONER

Don Hamrick, U.S. Merchant Seaman
5860 Wilburn Road
Wilburn, AR 72179

v.

RESPONDENTS

President George W. Bush
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Washington, DC 20528

Adm. Thomas H. Collins
Commandant (G-C)
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Washington, DC 20593-0001

Capt. J. P. Brusseau, Director,
Field Activities, Marine Safety, Sec, &
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Commandant (G-MO)
U.S. Coast Guard
Washington, DC 20593-0001

Judge Ellen Segal-Huvelle
U.S. District Court for DC
Washington, DC

Panel of Judges, Docket No. 02-5334
U.S. Court of Appeals for DC Circuit
Washington, DC

The Nine Justices of U.S. Supreme Court
Washington, DC

Rep. Frank LoBiondo (R-NJ)
House Subcommittee on Coast Guard
and Maritime Transportation
Washington, DC

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ADMINISTRATIVE OPINION OF THE U.S. COAST GUARD

On APRIL 19, 2002 (PATRIOTS DAY) the Final Agency Action denial issued from Captain J. P. Brusseau, USCG, Director of Field Activities, Marine Safety, Security and Environmental Protection of Commandant (G-MO), U.S. Coast Guard Headquarters in Washington, DC. That Final Agency Action. The body of that letter is included, in its entirety, herein:

Dear Mr. Hamrick:

This is to address your appeal of a decision by the Commanding Officer, Coast Guard National Maritime Center concerning your Merchant Mariner's Document. In your letter of 19 January 2002, you applied to have your Merchant Mariner's Document endorsed "National Open Carry Handgun." The Commanding Officer, Coast Guard National Maritime Center replied to you in his letter of 22 February, denying your application. You appealed that decision in your letter of 16 March to Secretary of Transportation Norman Y. Mineta, and supplemented your appeal with your letter of 29 March, also to Secretary Mineta. Your appeal was forwarded to me for final agency action as outlined in 46 CFR 1.03-15(j).

I am impressed with your scholarship and zeal in formulating arguments in support of your application for a "National Open Carry Handgun" endorsement on your Merchant Mariner's Document, but I am not persuaded to agree with you. As you have noted, the laws and regulations do not provide for such an endorsement nor do they prohibit it. Instead, the matter is left to my judgment. My decision, after considering all the material you have submitted, is that it would not be

in the best interest of marine safety or security to initiate the endorsement you have applied for. Your appeal is therefore denied and the Commanding Officer, National Maritime Center is directed not to place any endorsements regarding firearms on any merchant mariner's licenses or documents.[1]

This decision constitutes final agency action as cited above.

Sincerely,

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[1] In *Dred Scott* v. *Sanford*, 60 U.S. 393, 416-417 (1856) the U.S. Supreme Court delineated the differences between a free citizen and a slave. Slaves did not have the right "**to enter every other State whenever they pleased**, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the **full liberty of speech in public** and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, **and to keep and carry arms wherever they went.**"

Abraham Lincoln's Emancipation Proclamation of January 1, 1863, freeing the Southern slaves stated: "*The Executive Government of the United States, including the military* ***and naval authority*** *thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their* ***actual freedom.***"

The U.S. Coast Guard is a ***naval authority.*** The Coast Guard has denied Petitioner ***his efforts for actual freedom.***

"Actual freedom" is the right of a U.S. citizen to travel intrastate and interstate while openly armed for personal security. These are the Second and Ninth Amendment rights and Tenth Amendment powers of the People under the Bill of Rights.

J.P. Brusseau
Captain, U.S. Coast Guard
Director of Field Activities
Marine Safety, Security, & Environmental Protection

JURISDICTION

The date of the U.S. District Court for the District of Columbia's dismissal with prejudice of the Petitioner's RICO Act case against the United States was August 16, 2004.

This Petition for Writ of Certiorari to the U.S. Supreme Court from the U.S. Court of Appeals for the District of Columbia Circuit is filed in accordance with Rule 11 of the Rules of the Supreme Court of the United States.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

In accordance with Rule 29.4(a) service has been performed on the Solicitor General of the United States via prepaid Priority Mail.

REASONS FOR GRANTING THE WRIT

The U.S. Department of Justice's August 24, 2004 *MEMORANDUM OPINION FOR THE ATTORNEY GENERAL* titled, *WHETHER THE SECOND AMENDMENT SECURES AN INDIVIDUAL RIGHT*, concluding that *the Second Amendment secures an individual right to keep and to bear arms* is the latest in a series of official opinions acknowledging the individual rights' status of the Second Amendment.

In this past century the U.S. Congress, the federal courts, the State Assemblies and the State courts have taken a restrictive interpretation regarding the Second

Amendment and the *Common Defence* clause in the Preamble to the U.S. Constitution to the extent that the American people today are prohibited from exercising Second Amendment rights that were once freely and openly exercised before the Reconstruction Era of the American Civil War.

The U.S. Constitution and the Bill of Rights with the Thirteenth and Fourteenth Amendments are interdependent upon each other for insuring that the guarantee of our Republican Form of Government will always be preserved by an openly armed People. The gun control agenda has served to subvert this guarantee and this treachery is becoming more and more exposed through a rediscovery of the true meaning and intent of the Second Amendment by a growing number of federal courts and now by the U.S. Department of Justice.

The Second Amendment is now officially recognized as a civil right. But the scope and range of that civil right, i.e., the Second and Night Amendment rights and Tenth Amendment power to be openly armed (at least with a handgun worn as a sidearm) in intrastate and interstate travel as a U.S. citizen under the Fourteenth Amendment (the Incorporation Doctrine) has yet to be officially determined or recognized. This is the compelling reason under Rule 10 and in accordance with 28 U.S.C. § 2101(e) for the U.S. Supreme Court to grant the Petitioner his Petition for Writ of Certiorari.

Joseph Story's commentary on *the common defence* clause of the Preamble to the Constitution states in part:

> "*No one can doubt that this does not enlarge the powers of Congress to pass any measures which*

they deem useful for the common defence. But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be governed by the intent of the power; if one could promote and the other defeat the common defence, ought not the former, upon the soundest principles of interpretation, to be adopted?" [2]

The Second Amendment rights of U.S. civilian merchant seamen living at home in the United States, whether they are engaged in intrastate and interstate travel must also be officially recognized in law and regulations under U.S. jurisdiction and in maritime law.

Restrictive interpretations of the Second Amendment has served to defeat the *Common Defence* and has also served to cause havoc to Domestic Tranquility (Preamble to the U.S. Constitution) and has further undermined the General Welfare. It is time long overdue to return to the other more liberal interpretation of the *common defence* and the Second Amendment.

Citing from the conclusion of Brannon P. Denning's, *GUN SHY: THE SECOND AMENDMNT AS AN*

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[2] 1 J. Story, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (Boston: 1833), 462. For a lengthy exegesis of the preamble phrase by phrase, see M. Adler & W. Gorman, *THE AMERICAN TESTAMENT* (New York: 1975), 63–118. Cited in U.S. Senate Document No. 103-6; 103d Congress, 1st Session, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION: ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 29, 1992*

"UNDERENFORCED CONSTITUTIONAL NORM," 21 Harv. J.L. & Pub. Pol'y 719 (Summer, 1998):

> Until the Court decides to take up the question squarely, however, and as long as lower federal courts perpetuate more erroneous decisions, judicial underenforcement of the Second Amendment will continue. By adopting Professor Sager's thesis, I have also attempted to refocus the debate from the now-familiar Standard Model versus States' right model. That debate has run its course; I believe that both sides have garnered all the converts they will get. As in previous works on the Second Amendment, I have been interested in exploring why the Second Amendment continues, in the federal judiciary, to be a constitutional pariah, barred from associating with other "high caste" civil liberties our judges have labored to protect.
>
> Professor Sager's underenforcement thesis seems a wonderful lens through which to view the Second Amendment question, and I have argued that doing so helps clarify things. In suggesting remedies, I do not pretend to have all the answers, just as I have not attempted to answer the myriad questions that would arise from full judicial enforcement of the Second Amendment. Such consensus will have to come after a challenging, but exciting and necessary, debate. I hope this Article might serve to move that debate forward, which I sincerely hope will be conducted in a reasoned, disinterested

manner that befits those of us who have devoted ourselves to constitutional scholarship.[3]

Citing the conclusion from Ian Redmond, *LEGISLATIVE REFORM: THE SECOND AMENDMENT: BEARING ARMS TODAY*, 28 Journal of Legislation 325 (2002):

> Despite decades of neglect by the Supreme Court,[4] the Second Amendment endures as one of the explicit guarantees of our federal Constitution. Though some believe the amendment was once the "quintessential example" of "settled constitutional law,"[5] even they must admit that recent scholarship in the

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[3] Predictions - and pleas, too - play a crucial role in the continuing dialogue between Congress and the Supreme Court; so do the other efforts by Congress to change the Court's mind. *Katzenbach* v. *Morgan* may be best read as no more than an implicit judicial acknowledgment of the truth of both these propositions.

Carter, supra note 402, at 863.

[4] See Koren Wai Wong-Ervin, *THE SECOND AMENDMENT AND THE INCORPORATION CONUNDRUM: TOWARDS A WORKABLE JURISPRUDENCE*, 50 Hastings L.J. 177 (1998), ("Despite a large number of United States Supreme Court cases interpreting the Bill of Rights, the Supreme Court has almost entirely avoided interpreting the Second Amendment."); David E. Murley, *PRIVATE ENFORCEMENT OF THE SOCIAL CONTRACT: DESHANEY AND THE SECOND AMENDMENT RIGHT TO OWN FIREARMS*, 36 Duq. L. Rev. 827 (1998), ("The United States Supreme Court has been derelict in its duty to interpret the right to keep and bear arms.").

[5] Carl T. Bogus, *FRESH LOOKS: THE HISTORY AND POLITICS OF SECOND AMENDMENT SCHOLARSHIP: A PRIMER*, 76 Chi.-Kent L. Rev. 3 (2000).

area has fueled a lively debate among academics, jurists, and citizens alike concerning the scope of the right to bear arms.[6] There is no modern consensus among Americans on the issue, but a growing number of people have concluded that, consistent with the text of the amendment itself, the Second Amendment safeguards an individual right from federal infringement. At least two justices of the Supreme Court have indicated that they suspect the same to be true. Quite recently, moreover, the United States Court of Appeals for the Fifth Circuit has also endorsed the individual right interpretation of the amendment.

Those who have concluded that the Second Amendment protects an individual right may disagree with the formulations of several federal courts of appeals, but it is their conclusion that finds support in the United States Constitution. If and when the Supreme Court answers Justice Thomas's recent call to reconsider the scope of the Second Amendment,[7] the justices [*348] should recognize as much. Moreover, in the event that someone brings a challenge against a state law infringing upon the right to bear arms, the Court should incorporate the right to bear arms against the states under the Due Process

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[6] *See* Wong-Ervin, at 178.

[7] See *Printz*, 521 U.S. at 939 (Thomas, J., concurring) ("Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic.'") (quoting 3 J. Story, Commentaries § 1890 (1833)).

> Clause of the Fourteenth Amendment. Only then will the Second Amendment, which safeguards what Justice Joseph Story called "the palladium of the liberties of a republic,"[8] be afforded its proper place amongst our fundamental freedoms.

Justice Thomas had speculated in the *Printz* case. Justice Thomas stated:

> Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "*has justly been considered, as the palladium of the liberties of a republic.*" 3 J. Story, Commentaries §1890, p. 746 (1833).[9]

That some future date is now!

Petitioner's case has such imperative public importance as to justify deviation from the normal appellate practice and to require immediate determination in the United States Supreme Court under Rules 10 and 11 of the *RULES OF THE SUPREME COURT OF THE UNITED STATES* as well as in accordance with 28 U.S.C. § 2101(e).

STATEMENT OF THE CASE

A. THE SCOPE OF THE SECOND AMENDMENT AS AN INDIVIDUAL RIGHT

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[8] *Id.*

[9] *Printz* v. *United States* (95-1478), 521 U.S. 98 (1997). Nos. 95-1478 and 95-1503. *Jay Printz, Sheriff/Coroner, Ravalli County, Montana, Petitioner 95-1478* v. *United States Richard Mack, PETITIONER 95-1503.*

On August 24, 2004 the U.S. Department of Justice issued their Memorandum Opinion for the Attorney General, titled, *WHETHER THE SECOND AMENDMENT SECURES AN INDIVIDUAL RIGHT*. In that 106 page Memorandum Opinion the Justice Deprtment stated their conclusion on the Second Amendment:

> . . . ,we conclude that the Second Amendment secures an individual right to keep and to bear arms. Current case law leaves open and unsettled the question of whose right is secured by the Amendment.[10] Although we do not address the scope of the right, our examination of the original meaning of the Amendment provides extensive reasons to conclude that the Second Amendment secures an individual right, and no persuasive basis for either the collective-right or quasi-collective-right views. The text of the Amendment's operative clause, setting out a "right of the people to keep and bear Arms," is clear and is reinforced by the Constitution's structure. The Amendment's prefatory clause,

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[10] PETITIONER'S NOTE: This statement directly contradicts the Memorandum Opinion of Judge Ellen Segal Huvelle of the U.S. District Court for the District of Columbia in Plaintiff's Case No. 04-1435 of October 9, 2002, dismissed with prejudice. In her Memorandum Opinion she stated:

> *Miller remains the most authoritative modern pronouncement on the amendment's meaning and its conclusion that the right to bear arms is limited by the needs of an organized militia has subsequently been echoed by the Supreme Court and followed in this and other circuits.*

The Petitioner construes the contradiction under Rule 406 of the Federal Rules of Evidence as evidence of judicial bias in Judge Ellen Segal Huvelle.

> properly understood, is fully consistent with this interpretation. The broader history of the Anglo-American right of individuals to have and use arms, from England's Revolution of 1688-1689 to the ratification of the Second Amendment a hundred years later, leads to the same conclusion. Finally, the first hundred years of interpretations of the Amendment, and especially the commentaries and case law in the pre-Civil War period closest to the Amendment's ratification, confirm what the text and history of the Second Amendment require.

In order to properly determine the scope of the Second Amendment rights an examination of the Preamble to the U.S. Constitution and the Preamble to the Bill of Rights must be performed.

The Preamble to the U.S. Constitution reads:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The Petitioner construes from the Preamble that all enforcement, legislative, or litigious actions of the U.S. Government, the States, and the People (the distribution of Tenth Amendment powers between the People, the States, and the United States Government) shall, or are intended to, conform to one or more, or any combination of the six conditions or purposes of the Preamble. These six conditions or purposes are:

(1) in Order to form a more perfect Union,
(2) establish Justice,
(3) insure domestic Tranquility,
(4) provide for the common defence,
(5) promote the general Welfare, and
(6) secure the Blessings of Liberty to ourselves and our Posterity

Petitioner further construes the scope of the Second Amendment to be part of the definition of *the common defence* as to be viewed through the Tenth Amendment distribution of powers as including the People reserving the Power to assist and participate in *the common defence* at the personal and social levels of our constitutional society by reserving the right to be openly armed through the Second, Ninth, Thirteenth, and Fourteenth Amendments as we travel the various states to guard against common crimes.

Purpose and Effect of the Preamble[11]

Although the preamble is not a source of power for any department of the Federal Government,[12] the Supreme Court has often referred to it as evidence of the origin, scope, and purpose of the Constitution.[13] "Its true

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[11] U.S. Senate, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION: ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 29, 1992*; Senate Document No. 103-6; 103d Congress, 1st Session, p. 53.

[12] *Jacobson* v. *Massachusetts*, 197 U.S. 11, 22 (1905).

[13] E.g., the Court has read the preamble as bearing witness to the fact that the Constitution emanated from the people and was not the act of sovereign and independent States,

> office," wrote Joseph Story in his COMMENTARIES, "is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the preamble declares one object to be, 'to provide for the common defense.' No one can doubt that this does not enlarge the powers of Congress to pass any measures which they deem useful for the common defence. *But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one could promote and the other defeat the common defence, ought not the former, upon the soundest principles of interpretation, to be adopted?*"[14], [15]

The U.S. Department of Justice's Memorandum Opinion returns us to that proverbial fork in the road where we must decide between the restrictive or the liberal constructions of the Second Amendment if we

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McCulloch v. *Maryland*, 4 Wheat. (17 U.S.) 316, 403 (1819), *Chisholm* v. *Georgia*, 2 Dall. (2 U.S.) 419, 471 (1793); *Martin* v. *Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 324 (1816), and that it was made for, and is binding only in, the United States of America. *Downes* v. *Bidwell*, 182 U.S. 244, 251 (1901); *In re Ross*, 140 U.S. 453, 464 (1891).

[14] Petitioner's emphasis.

[15] 1 J. Story, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (Boston: 1833), 462. For a lengthy exegesis of the preamble phrase by phrase, see M. Adler & W. Gorman, *THE AMERICAN TESTAMENT* (New York: 1975), 63–118.

are to promote the common defence based upon the soundest principles of interpretation without the contamination of political ideologies. The restoration of the right to *openly* keep and bear arms is hereby demanded as the proper choice under Joseph Story's interpretation of *the common defence.*

The Preamble to the Bill of Rights

> Congress of the United States
>
> Begun and held at the City of New-York, on Wednesday, March 4, 1789
>
> THE Conventions of a number of States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.[16]
>
> RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.
>
> ARTICLES in addition to, and Amendment of the Constitution of the United States of

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[16] Petitioner's emphasis.

> America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

Petitioner asserts that the collective effect of (1) the Preamble to the Constitution; (2) Preamble to the Bill of Rights; (3) the shall not be infringed clause of the Second Amendment; (4) the Ninth, Tenth, Thirteenth and Fourteenth Amendments; (5) the Full Faith and Credit Clause and the Privileges and Immunities Clause of Article IV; (6) the delegation of the President being the Commander in Chief of the Militia of the several States in Section 2, Article II; (7) the clause in Article IV, Section 4 stating, "*The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence*," all serve as a barrier to federal firearms laws through the Commerce Clause of Section 8, Article I of the U.S. Constitution and prohibits the States from enacting laws by the same barriers through the Fourteenth Amendment.

> "A right vested in a citizen means that he has the power to do certain acts, or to possess certain things, according to the law of the land." *Calder* v. *Bull*, 3 Dall 386, 1 L.Ed. 648.

> "Among the historic liberties protected by the due process clauses of the Fifth and Fourteenth Amendments is the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Ingraham* v. *Wright*, 430 US 651, 97 S.Ct. 1401, 51 L.Ed.2d. 711.

The change in the official policy of the United States government on the Second Amendment is

contained in Footnote 3 to the U.S. Supreme Court Brief on May 7, 2002, for the United States in Opposition to *Timothy Joe Emerson* v. *United States* on Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, No. 01-8780; Theodore B. Olson, Solicitor General and Council of Record.

That portion of Footnote 3 reads:

> The current position of the United States, however, is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse. See *MEMORANDUM FROM THE ATTORNEY GENERAL TO ALL UNITED STATES ATTORNEYS*, Re: United States v. Emerson, Nov. 9, 2001. A copy of that memorandum is appended to this brief.

B. STARE DECISIS BASED ON *UNITED STATES* V. *MILLER* 307 U.S. 174 (1939).

Petitioner disagrees with *State Oil Co.* v. *Khan* 522 U.S. 3, 118 S.Ct. 275, 139 L. Ed. 2d 199, where in that case it was said that, "*The doctrine of stare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right.*" *See* Appendix H for a dissenting opinion on *Stare Decisis* from Jon Roland of the Constitution Society. Petitioner asserts that it is more important that the applicable rule of law be settled right than that it be just simply and

expediently settled lest we violate the Guarantee of a Republican Form of Government as stipulated in Article IV, Section 4 of the Constitution and introduce a Nihilistic Form of Government as we may already find under the Patriot Act where the Rule of Law suddenly becomes the Rule of Suspicion. *See* APPENDIX I for *THE NINTH CIRCUIT'S INTERIM REPORT: TASK FORCE ON SELF-REPRESENTED LITIGANTS COMMENTS ON THE NINTH CIRCUIT PRO SE TASK FORCE REPORT* by Charles W. Heckman, Dr. Sci., A Matter of Justice Coalition (AMOJ) Committee for the Ninth Circuit. Much of what is detailed in that Report has occurred in all of Petitioner's cases, from the U.S. District Court to the U.S. Supreme Court to the extent that Petitioner wrote his political poem reflecting the People's disdain for the state of American justice today. *See* Appendix J for Petitioner's political poem, *A NIHILISTIC GOVERNMENT, THIS UNITED STATES.*.

> "When the United States Supreme Court is asked to invalidate a statutory provision that has been approved by both houses of Congress and signed by the President, it should do so only for the most compelling constitutional reasons." *Mistretta* v. *United States*, 488 US 361 (1989), 109 S Ct 647, 102 L Ed 2d 714.

The Petitioner further construes that if any particular law or any whole section of law fails to fulfill any number of these six purposes then those laws are unconstitutional and are therefore void in accordance with *Marbury* v. *Madison*, 1 Cranch 137 (1803). Compare the U.S. Department of Justice's Memorandum Opinion for the Attorney General, *WHETHER THE SECOND AMENDMENT SECURES AN INDIVIDUAL RIGHT*, dated August 24, 2004, with Judge

Huvelle's Memorandum Opinion in APPENDIX B. Her Memorandum Opinion will be found to be in error and the case should then be overturned and should then be remanded back to that District Court for trial. And all other subsequent Memorandum Opinions dismissing Petitioner's other cases with prejudice will also be overturned as they were based on Judge Huvelle's faulty opinion.

C. THE U.S. MERCHANT SEAMAN & THE SECOND AMENDMENT

The U.S. Coast Guard is required by law, (46 U.S.C. § 7301(b), 7302, 7303, 7306(a)(3), 46 U.S.C. Appendix § 1295), and by the Second Amendment to the U.S. Constitution as an individual right to endorse a Merchant Mariner's Document with "National Open Carry Handgun" when a U.S. Able Seaman presents a certificate of course completion for a firearms recertification course for the 9mm handgun, the 12-ga. Shotgun and the M14 rifle when that training is a requirement of an Able Seaman aboard a U.S. merchant vessel in accordance with 46 U.S.C. § 7306(a)(3). The Coast Guard does not have the authority to deny an application for an endorsement for National Open Carry Handgun presenting "applicable examination" and "educational requirement" when the Able Seaman is not a prohibited person from possessing firearms under 18 U.S.C. § 922 *et seq* simply because of omissions in Coast Guard regulations. Nor does the Coast Guard have the authority to deny such an application where the United States Constitution's Second Amendment, the Bill of Rights, the Thirteenth and Fourteenth Amendments or Abraham Lincoln's Emancipation Proclamation directly apply. The Thirteenth Amendment is just as much an individual right to keep

and bear arms as is the Second Amendment but for a different purpose, even for U.S. Merchant Seamen not employed aboard ship, but living ashore in the United States.

At 1:49 P.M. on November 25, 2002 with the signature of President George W. Bush the Homeland Security Act of 2002 became law. On March 1, 2003 the U.S. Coast Guard was transferred from the Department of Transportation to the Department of Homeland Security in accordance with the Department of Homeland Security Reorganization Plan dated November 25, 2002.

In light of the transference of the U.S. Coast Guard Petitioner questions the efficacy of 49 U.S.C. § 2103, in that the Secretary of Transportation "has general superintendence over the merchant marine of the United States and of merchant marine personnel insofar as the enforcement of this subtitle is concerned and insofar as those vessels and personnel are not subject, under other law, to the supervision of another official of the United States Government. In the interests of marine safety and seamen's welfare, the Secretary shall enforce this subtitle and shall carry out correctly and uniformly administer this subtitle. The Secretary may prescribe regulations to carry out the provisions of this subtitle."

The question is that if the general superintendence over the merchant marine of the United States and of merchant marine personnel is transferred to the Department of Homeland Security then what role will the U.S. Merchant Marine play under the Department of Homeland Security.

It is a logical presumption that the circumstances necessitating the reorganization of the Federal

government establishing the Department of Homeland Security also take into account the fighting force of the U.S. Merchant Marine personnel as a viable resource to augment security plans of our nations seaports to restore Second Amendment rights of not only the U.S. Merchant Marine personnel but also to law abiding citizens in order to maintain the balance of power between the People, the State, and the Federal government, that one part shall never gain an excessive advantage over the other?

Petitioner's case is for a Writ of Mandamus to President Bush directing the U.S. Coast Guard to endorse Petitioner's Merchant Mariner's Document with "National Open Carry Handgun." This endorsement would blend exceptionally well in a greater role for the Merchant Marine industry under the Department of Homeland Security as falling under the original meaning of the Preamble to the United States Constitution and the Preamble to the Bill of Rights supporting the right to keep and bear arms in interstate and intrastate commerce as well as for personal security of the individual U.S. citizen.

Petitioner questions the constitutionality of State and Federal firearms laws that infringe, restrict, or prohibit the right to travel while openly armed under the Second Amendment for the purpose of personal security and the security of a free state as violating the Fifth, Ninth, Tenth, Thirteenth and Fourteenth Amendments as establishing a form of legislated slavery and/or involuntary servitude as defined by the 1856 U.S. Supreme Court case in *Dred Scott* v. *Sanford*.

One of the general requirements and classifications for able seaman is "qualified professionally as

demonstrated by an applicable examination or educational requirement" as per 46 U.S.C. 7306(a)(3). The naval document stipulating the requirements for small arms training is OPNAVINST 3591.1C, "Small Arms Training and Qualification" qualifying it as applicable examination or educational requirement. The Secretary of Transportation [or the Department of Homeland Security, as the case may be] may prescribe regulations to carry out this chapter as per 46 U.S.C. 7301(b). However, Petitioner questions that when the Coast Guard is transferred to the Department of Homeland Security on March 1, 2003 will the Secretary of Homeland Security prescribe regulations to carry out the same function for firearms training for Able Seaman?

Capt. J. P. Brusseau admits there are no laws or regulations governing an endorsement for national open carry handguns or small arms and light weapons. When there are no laws or regulations a U.S. Coast Guard officer is bound by his Oath of Office to look to the U.S. Constitution for guidance. When the U.S. Constitution compels action in defense of constitutional rights that Coast Guard officer does not have the authority to exercise his discretion in denying an application for an endorsement relying upon the Second, Ninth, and Tenth Amendments.

33 CFR, Subchapter H codifies the International Ship & Port Security (ISPS) Code; the Safety of Life at Sea (SOLAS) XI-2; and the Maritime Transportation Security Act (MTSA) 2002. 33 CFR § 104.220 imposes an unwarrated risk of injury or death for unarmed crew members performing the requisite security duties. Training in and arming crew members with firearms in the performance of these security duties will reduce liability for injuries and deaths.

Nothing in the laws cited above positively or even remotely, prohibits the U.S. Coast Guard from endorsing Merchant Mariner's Documents with *NATIONAL OPEN CARRY HANDGUN OR SMALL ARMS AND LIGHT WEAPONS.*

D. GOVERNMENT RACKETEERING AND THE SECOND AMENDMENT.

The Seamen's Suit law, 28 U.S.C. § 1916 states: "*In all courts of the United States, seamen may institute and prosecute suits and appeals in their own names and for their own benefit for wages or salvage or the enforcement of laws enacted for their health or safety without prepaying fees or costs or furnishing security therefor.*"

Evidence of Racketeering Activity (Compare With Appendix I)

(1) Obstruction of Justice by U.S. Department Justice: The U.S. Department of Justice wilfully and maliciously obstructed justice for political gain, withheld evidence vital to Petitioner's RICO Act case (No. 03-2160), and violated Petitioner's right to due process, etc., in order to keep their *MEMORANDUM OPINION FOR THE ATTORNEY GENERAL ON WHETHER THE SECOND AMENDMENT SECURES AN INDIVIDUAL RIGHT* from the Petitioner. *See* Appendix C for a chronology of these events.

(2) Extortion (18 U.S.C. § 872): The U.S. Supreme Court violated its own Rule 40(2) and the Seamen's Suit law, 28 U.S.C. § 1916, by forcing the Petitioner, in Case No. 03-145, to pay their filing fee when the Petitioner was a fully document U.S. Seaman before the Petitioner's appeal would be accepted as filed.

(3) Article III Violation - Judicial Bias in the U.S. Supreme Court Against a *Pro Se* Petitioner with a Second Amendment case: The U.S. Supreme Court exhibited "bad behavior" under Article III in a display of judicial bias against a pro se plaintiff with a Second Amendment case. Compare the Docket Reports for the *Silveira* case (No. 03-51) and the *Hamrick* case (No. 03-145).

(4) Extortion (18 U.S.C. § 872): The U.S. Court of Appeals for the DC Circuit violated the Seamen's Suit law by requiring the Petitioner, in Case No. 02-5334 and Case No. 03-5021, to pay their respective filing fees before the Petitioner's appeal would be accepted as filed.

(5) Extortion under 18 U.S.C. § 872 is a predicate act of "racketeering activity" under the RICO Act under 18 U.S.C. § 1961(1).

(6) False Statements 18 U.S.C. § 1001(a): Judge Ellen Segal Huvelle's Memorandum Opinion in Petitioner's Case No. 02-1435 was proven to be infested with erroneous conclusions based on a false reliance on *Miller* and probably from a political ideology misconstrued as the rule of law by the U.S. Department of Justice's Memorandum Opinion for the Attorney General on the Second Amendment.

(7) False Statements 18 U.S.C. § 1001(a): Judge Ellen Segal Huvelle's Memorandum Opinion in Petitioner's Case No. 02-1434 was an erroneous application of qualified and absolute immunity assisted by inadmissible evidence getting entered into the record as admissible evidence, and other judicial irregularities.

(8) Obstruction of Justice by Judges: Judge Richard W. Roberts, in answer to Petitioner's Motion for Recusal in Case No. 03-2160 (RICO Case) stated: "*I recommend to the Calendar Committee that it seek to have a judge from another district assigned to this matter.*" Judge Reggie B. Walton was erroneously assigned to Petitioner's Case No. 03-2160, because Judge Reggie B. Walton is *NOT* a judge from *ANOTHER* district but he *IS* a judge from the *SAME* district as Judge Richard W. Roberts. How did Judge Walton get selected to preside over the Plaintiff's case when Judge Walton was, at that time, presiding over another Second Amendment case, *Seegars* v. *Ashcroft*, 297 F. Supp. 2d 201 (D.D.C. 2004)? Judge Walton ruled in the *Seegars* case that the Second Amendment does not apply to the citizens of the District of Columbia. This ruling gave Judge Walton a predisposition to rule with bias against the Petitioner's RICO Act case alleging the United States is racketeering an unlawful and an unconstitutional protection scheme over the Second Amendment as evidenced in Petitioner's judicial track record in Case No. 02-1434 and Case No. 02-1435.

(9) Complaint of Judicial Misconduct filed with the Judicial Council for the DC Circuit by the Petitioner was Denied: The appeal for review was also denied. The Petitioner alleged judicial bias and/or judicial activism against plaintiffs, whether represented or *pro se*, with Second Amendment cases as an individual right exists in the U.S. District Court for DC, the U.S. Court of Appeals for the DC Circuit, and the U.S. Supreme Court in review of all of Petitioner's cases. Petitioner's allegations range from irrelevant (inadmissable) evidence was admitted as relevant evidence in Petitioner's original cases: Case

No. 04-1434 and No. 04-1435; to the DC Circuit rubber stamping the District Court's dismissal with prejudice without examining the merits of Petitioner's case in a fair and impartial manner.

(10) Abuse of Absolute & Qualified Immunities: The incident that triggered Petitioner's constitutional tort claim against the U.S. Coast Guard (Case No. 02-1434) was a publishable article written by the Petitioner emailed to Capt. J. P. Brusseau, USCG, Director of Field Activities, Marine Safety, Security & Environmental Protection at Coast Guard Headquarters in Washington, DC. The article was about unarmed law-abiding citizens getting murdered by criminals in today's society with its huge amount of federal, state, and local gun control laws and ordinances. Capt. Brusseau misconstrued the article as a death threat. Because the Petitioner, at that time, was aboard a U.S. Government pre-position vessel anchored off the coast of Lithuania he orders to the Petitioner's employer to have the Petitioner put ashore at Hotel Klaipeda to await the arrival to two civilian special agents of the Naval Criminal Investigative Service (NCIS) to determine whether Capt. Brusseau's perceived threat was real or imaginery. The NCIS special agents determined that the Petitioner intended no threat whatsoever toward Capt. Brusseau and was allowed to return to the vessel. However, the vessel had departed for a 10-day exercise with the U.S. Navy. The Petitioner subsequently had to stay at Hotel Klaipeda for a total of 12 days. The next port of call for the vessel was Tallinn, Estonia where the Petitioner was driven to rejoin the vessel.

Petitioner's RICO Act case (No.03-2160) at the U.S. District Court for the District of Columbia was dismissed with prejudice on August 16, 2004. The U.S.

Department of Justice issued their Memorandum Opinion for the Attorney General on the Second Amendment on August 24, 2004, just 8 days after the dismissal with prejudice, but withheld it from public release until December 2004, well after the presidential elections. The Justice Department's Memorandum Opinion was vital evidence to Petitioner's case which could have led to Court to deny the government's motion to dismiss with prejudice and allowed the case to proceed to trial. The U.S. Department of Justice as subverted justice for political gain and the Petitioner cannot prevail in any of his cases for his constitutional rights.

(11) Petitioner Resorted to Guerilla Warfare Litigation to Collect Evidence of Judicial Bias & Corruption in the Pursuit of Justice: Suspecting judicial bias in Judge Richard J. Leon of the U.S. District Court for the District of Columbia the Petitioner initiated ***Guerilla Warfare Litigation*** against the National Rifle Association (NRA), the Second Amendment Foundation (SAF), and the KeepAndBearArms.com (KABA)(Case No. 04-2040) in order to collect evidence of judicial bias. In terms of the Preamble the bias and corruption of the federal courts have caused a disturbance in the *Domestic Tranquility* over the Second Amendment which threatens the safety and security of society and this nation which serves to defeat the *Common Defense* and denigrate the *General Welfare.* The judicial bias derives from Judge Walton's and Judge Huvelle's reluctance or refusal to promptly rule on Petitioner's motions allowing time for the Government's motion to dismiss with prejudice to be entered into the record and thereby promptly dismissing Petitioner's cases. The libel case against the NRA, SAF, and KABA was

Petitioner's tactic to expose the Court's eagerness to assist Petitioner's case to trial since it was against Second Amendment advocacy groups. Judge Richard J. Leon took the bait by issuing a Case Management Order on December 2, 2004 before the Petitioner could prepare his objection to defendants' Motions to Dismiss. Petitioner construes the Case Management Order as evidence of judicial bias when it is viewed with Petitioner's other cases where the judges were failing or refusing to act in Petitioner's favor. Having acquired evidence of judicial bias in Judge Leon, Petitioner filed his Motion to Dismiss Without Prejudice.

The judicial history of all of Petitioner's cases can be construed as prima facie evidence of racketeering activities of the Judicial and Executive Branches with support from the Legislative Branch of the United States Government in support of an unlawful and unconstitutional protection scheme over the Second Amendment in violation of the Ninth Amendment rights of the People and the Tenth Amendment's distribution of power between the People, the States, and the United States Government.

E. The Second Amendment v. International Treaties & Conventions

The *U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects* and the *U.N. Programme of Action* resulting thereof in conjunction with the *U.N. Department of Disarmament Affairs' Disarmament Agenda for the 21st Century (DDA Occasional Papers No. 6, October 2002)* and in conjunction with the *U.N.'s International Maritime Organization's (IMO) Maritime Safety Committee's (MSC) Piracy and*

ARMED ROBBERY AGAINST SHIPS: GUIDANCE TO SHIPOWNERS AND SHIP OPERATORS ON PREVENTING AND SUPPRESSING ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS (MSC/CIRC.623/REV.3 DATED MAY 29, 2002)'s anti-gun recommendations in paragraphs 45 and 46 are direct attacks on Second Amendment.

Citing from the IMO/MSC Circ. 623/Rev.3 dated May 29, 2002's firearms section:

> ¶45 *The carrying and use of firearms for personal protection or protection of a ship is strongly discouraged.*
>
> ¶46 *Carriage of arms on board ship may encourage attackers to carry firearms thereby escalating an already dangerous situation, and any firearms on board may themselves become an attractive target for an attacker. The use of firearms requires special training and aptitudes and the risk of accidents with firearms carried on board ship is great. In some jurisdictions, killing a national may have unforeseen consequences even for a person who believes he has acted in self defence.*

It has been fully documented that piracy attacks on merchant ships have steadily increased in the last 10 years with a growing number of crew members getting murdered by fully automatic and semi-automatic weapons. Indeed, an unarmed crew is an open invitation to pirates and terrorists alike to board a ship and kill its crew with little or no risk to the pirates or terrorists. The crew might as well invite them to dinner before the pirates and terrorists begin their slaughter.

There are several remedies for treaties that abrogate, infringe, or nullify the Second Amendment rights of the American seafarer aboard U.S. flag vessels. Citing from CORPUS JURIS SECUNDUM: TREATIES:

> PART IV. RELATION TO, AND CONFLICT WITH, OTHER LAWS
>
> § 13. Generally
>
> Without express authority from Congress, or authority otherwise clearly indicated, the courts are bound to recognize treaties as lawfully made. However, the courts have the authority to declare the invalidity of a treaty in a proper case where the rights of citizens are involved.
>
> § 14. Acts of Congress
>
> Treaties and acts of Congress, are placed on the same footing and are of like obligation, so that neither having any inherent superiority over the other, either may supersede the other. *Even so, neither treaties nor laws passed pursuant to them are free from the restraints of the United States Constitution, such as the Bill of Rights.*[17]

Petititoner notes that the *United States* is omitted in the second sentence of Section 1 of the Fourteenth Amendment. As literally worded, does this omission give the United States government the power to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States? Or shall

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[17] *United States* v. *Yian*, 905 F. Supp160 (S.D.N.Y. 1995), aff'd, 134 f.3d 79 (2d Cir. 1998). *Italics and underlining are Petitioner's emphasis for the Second Amendment rights of U.S. seafarers.*

deprive any person of life, liberty, or property, without due process of law? Or deny to any person within its jurisdiction the equal protection of the laws? If this literal interpretation is correct then a constitutional amendment is necessary to correct this tyranny.

> *"We are fast approaching the stage of the ultimate inversion: the stage where the government is free to do anything it pleases, while the citizens may act only by permission; which is the stage of the darkest periods of human history, the stage of rule by brute force."*
>
> Ayn Rand, The Nature of Government

The hypocrisy of the Judicial and Executive Branches of the U.S. Government on the Second Amendment as an individual right will likely continue if Alberto Gonzales is confirmed as the Attorney General. On January 18, 2005 Mr. Gonzales stated "*that he supports extending the expired federal assault weapons ban*" (Washington Times, Jan. 19, 2005, A4) and further stated that "*he wants Congress to get rid of a requirement that would eliminate part of the USA Patriot Act this year, dispite complaints that it is too intrusive.*" (Ib.)

The Petitioner, Don Hamrick, respectfully prays that his Petition for Writ of Certiorari be accepted on reason that the case has imperative public importance having certain constitutional questions that require immediate determination in the Supreme Court of the United States.

Don Hamrick
5860 Wilburn Road
Wilburn, AR 72179

APPENDIX A: Proof of Docketing

General Docket
D.C. Circuit Court of Appeals

04-5316 04-5316

Court of Appeals Docket #: 04-5316
Filed: September 9, 2004
Nsuit: 2890 Other Statutory Actions
Hamrick, Don v. Bush, George W., et al

Appeal from: U.S. District Court

Lower court information:

District: 0090-1 : 03cv02160 lead: 03cv02160
Trial Judge: Reggie B. Walton, US Dist. Judge
Date Filed: October 21, 2003
Date order/judgment: August 16, 2004
Date NOA filed: August 27, 2004

Fee status: due (disputed)*
*(Statutorily Exempt under 28 U.S.C. § 1916)

Prior case:
None
Current cases:
None

APPENDIX B: District Court Memorandum Opinion

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DON HAMRICK, Plaintiff,	)	
v.	)	Civil Action
	)	No. 02-1435(ESH)
[President] Bush, et al Respondents	)	

MEMORANDUM

On July 18, 2002, petition filed a pro se Petition for A Writ of Mandamus, requesting this Court, inter alia, to compel the President of the United States to protect the constitutional rights of sailors in the U.S. Merchant Marine to carry handguns while ashore in the United States, to strike various federal statutes and regulations restricting individuals' right to transport firearms across state lines on the grounds that they violate the Second, Ninth, and Thirteenth Amendments of the U.S. Constitution, and to compel the U.S. Coast Guard to approve petitioner's application for "National Open Carry Handgun" endorsement on his Merchant Marine document. Petitioner has not served a complaint and summons on any of the parties he has named as respondents, seeking instead to use a petition-show cause order approach for the resolution of his grievances. Regardless of whether such an approach is appropriate in light of Rule 81(b) of the Federal Rules of Civil Procedure, it is clear that petitioner cannot satisfy the

stringent standards for mandamus relief and therefore that his petition must be dismissed.

The remedy of mandamus is an extraordinary one, and is reserved for extraordinary situations. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Under well-established Circuit law, mandamus relief is available only if three conditions are met: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff. *Power* v. *Barnhart*, 234 F.3d 1305, 1315 (D.C. Cir 2000)(mandamus issued "only for the most transparent violations of a clear duty to act"). The present petition falls far short of satisfying these stringent requirements.

The asserted legal bases for the relief sought by petitioner are the Second, Ninth, and Thirteenth Amendments of the Constitution, which, he claims, guarantee the right to carry firearms openly and without a license in interstate and intrastate travel. Petitioner argues that the Second Amendment's "right of the people to keep and bear arms" renders invalid any federal or state law restricting what he calls "National Open Carry Handgun" and requires the President and the Coast Guard to take the actions he has demanded. Moreover, according to petitioner, federal and state gun control laws create a form of "legislated slavery" in violation of the Thirteenth Amendment.

Taking the latter claim first, no court has ever so much as suggested that the Thirteenth Amendment confers any right to bear arms, and it is entirely fanciful to suggest that its prohibition of involuntary servitude somehow unambiguously requires the

overturning of a whole variety of gun control legislation. As for the Second Amendment, while it is true that the precise meaning of this provision continues to be in dispute in both judicial and academic circles, c.f. *United States* v. *Emerson*, 270 F.3d 203 (5th Cir. 2001), the very existence and intensity of that controversy make mandamus relief a decidedly inappropriate vehicle for fulfilling petitioner's demands. *Mandamus is reserved for circumstances in which the claimant's entitlement to relief and the defendant's obligation to provide such relief are unambiguous and undebatable. The Second Amendment simply offers no such clarity*.[18]

Moreover, the established law on this subject hardly supports petitioner's cause. In *United States* v. *Miller*, 307 U.S. 174, 178 (1939), the Supreme Court found that "absent some reasonable relationship to the preservation or efficiency of a well regulated militia," the possession of a weapon (short-barreled shotgun) could be proscribed without running afoul of the Second Amendment. *Miller* remains the most authoritative modern pronouncement on the amendment's meaning and its conclusion that the right to bear arms is limited by the needs of an organized militia has subsequently been echoed by the Supreme Court and followed in this and other circuits.[19] See *United States* v. *Lewis*, 445 U.S. 55, 65 n.8 (1980); accord United States, 264 F.3d 1161, 1165 (10th Cir.

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[18] Plaintiff's emphasis show evidence of judicial bias and/or erroneous judgment.

[19] Plaintiff's emphasis to show evidence of judicial bias and/or evidence that Judge Ellen Segal Huvelle is substituting her political ideology for the rule of law.

2001)(holding that "a federal criminal gun control law does not violated the Second Amendment unless it impairs the state's ability to maintain a well-regulated militia"). Under this interpretation, petitioner's claims appear largely without merit.

In sum, given the breadth of petitioner's demands and the narrowness of the constitutional provision that he relies on to justify those demands – more specifically, the lack of apparent connection between his right to keep and bear an unlicenced firearm and the needs of any organized militia – petitioner can establish neither that he has a clear right to relief nor that any of the named respondents has a clear duty to act. However the Second Amendment may ultimately come to be interpreted, the current understanding of that text certainly provides no obvious basis either for the wholesale negation of federal and state gun laws or for the open carry endorsement that petitioner seeks.

Since mandamus is clearly unavailable here, the Court must dismiss the petition with prejudice. Therefore, the Court need not address petitioner's claims for declaratory judgment or for injunctive relief. But if petitioner wishes pursue these claims, he is required to use the ordinary procedures of complaint and summons described in Rules 3 and 4 of the Federal Rules of Civil Procedure. See *Flat* v. *Islamic Republic of Iran*, 2002 WL 31245261, at *2 (D.C. Cir. Oct. 8, 2002) ("The Federal Rules of Civil Procedure provide that there shall be one form of action to be known as

'civil action' and such an action shall be commenced by filing a complaint with the court, with related service, answer, and motions obligations thereafter.") (internal quotation marks omitted).

ELLEN SEGAL HUVELLE
United States District Judge

DATE: October 9, 2002

APPENDIX C: EVIDENCE OF OBSTRUCTION OF JUSTICE, WITHHOLDING EVIDENCE, SUBVERTING JUSTICE FOR POLITICAL GAIN, VIOLATING PETITIONER'S RIGHT TO DUE PROCESS, ETC. BY THE U.S. DEPARTMENT OF JUSTICE

(Compare with Appendix I)

October 21, 2003: Plaintiff files RICO Act case in the U.S. District Court for DC (Case No. 03-2160) against the United States Government alleging racketeering an unlawful and unconstitutional protection scheme over the Second Amendment. Assistant U.S. Attorney Alan Burch assigned as Defense Counsel for the U.S. Government.

June 2, 2004: A little over 7 months of Defense Counsel Alan Burch issuing cookie-cutter objections to Petitioner's various motions without ever filing a Motion to Dismiss, a Notice of Appearance was filed by Special Attorney Dennis Barghaan of the U.S. Attorney's Office in Arlington, Virginia as the new Defense Attorney terminating Alan Burch as Defense Counsel for the U.S. Government.

June 21, 2004: Just 19 days after Special Attorney Dennis Barghaan was assigned as Defense Counsel he filed his Motion to Dismiss.

July 4, 2004: Paul D. Clement is named Acting Solicitor General for the U.S. Department of Justice replacing Theodore Olson.

July 15, 2004: Petitioner's Motion for Change of Venue was denied.

August 16, 2004: Judge Reggie B. Walton dismisses Petitioner's case with prejudice.

August 24, 2004: U.S. Department of Justice internally released their *MEMORANDUM OPINION FOR THE ATTORNEY GENERAL ON WHETHER THE SECOND AMENDMENT SECURES AN INDIVIDUAL RIGHT* but did not release it to the public until December 2004.

August 25, 2004: Petitioner filed with the Judicial Council for the DC Circuit his Complaint of Judicial Misconduct (No. 04-23) against Judges Reggie B. Walton and Ellen Segal Huvelle of the U.S. District Court for DC; the 3-judge panel of the DC Circuit in Case No. 02-5334; and the 9 justices of the U.S. Supreme Court.

August 27, 2004: Petitioner filed Notice of Appeal.

September 9, 2004: Petitioner filed his Appellant Brief with the U.S. Court of Appeals for the DC Circuit (Case No. 04-5316).

September 21, 2004: Petitioner's Complaint of Judicial Misconduct at the Judicial Council for the DC Circuit was dismissed by Chief Judge Douglas H. Ginsburg of the DC Circuit.

October 4, 2004: Petitioner filed Petition for Review of Order by Chief Judge Douglas H. Ginsburg dismissing Petitioner's Complaint of Judicial Misconduct.

October 26, 2004: Petition for Review of Complaint of Judicial Misconduct was denied.

November 2, 2004: Presidential election.

(On or about) December 17, 2004: U.S. Department of Justice is discovered to have posted on their Website their *MEMORANDUM OPINION FOR THE ATTORNEY GENERAL ON WHETHER THE SECOND AMENDMENT SECURES AN INDIVIDUAL RIGHT.*

APPENDIX D: AUGUST 16, 2004 MEMORANDUM OPINION of Judge Reggie B. Walton, U.S. District Court/ DC, Case No. 03-2160

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DON HAMRICK, Plaintiff,	)
v.	) Civil Action No. 03-2160 (RBW)
BUSH, et al., Defendants.	)

MEMORANDUM OPINION

The plaintiff's suit against the defendants arises from a denial of his request to carry a firearm as a member of the United States Merchant Marines and the subsequent dismissal of an earlier lawsuit brought by the plaintiff challenging this denial. Complaint ("Compl.") at 3. The defendants have filed a motion to dismiss asserting that the doctrine of res judicata bars those claims that were raised, or should have been raised, in the plaintiff's previous case, that the judicial defendants are entitled to absolute immunity, and that the plaintiff's claims brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, are barred because the United States has not waived its sovereign immunity. Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss ("Defs.' Mem.) at 5. The plaintiff failed to timely respond to the defendants' motion to dismiss. July 15, 2004 Order at 2. As a result, this Court issued an Order on July 15, 2004, extending the time in which the *pro se* plaintiff could file his

opposition to the motion to dismiss until July 30, 2004, explaining that a failure to file an opposition would result in the dismissal of his case. *Id.* at 2-3. The plaintiff has failed to respond to the July 15, 2004 Order, as he has not filed his opposition to the defendants' motion to dismiss and this Court will therefore treat the defendants' motion to dismiss as conceded. In any event, even if this Court did not consider the defendants' motion to dismiss conceded, it would nonetheless have to dismiss this case.

I. Factual Background[20]

On July 18, 2002, the plaintiff filed in the Court a Petition for a Writ of Mandamus[] requesting [that the] Court, *inter alia*, . . . compel the President of the United States to protect the constitutional rights of sailors in the U.S. Merchant Marine to carry handguns while ashore in the United States, to strike various federal statutes and regulations restricting individuals' right to transport firarms across state lines on the grounds that they violate the Second, Ninth, and Thirteenth Amendments of the U.S. Constitution, and to compel the U.S. Coast Guard to approve petitioner's application for 'National Open Carry Handgun' endorsement on his Merchant Marine Document.

Hamrick v. *Bush*, Civil Action No. 02-1435 (D.D.C. Oct. 9, 2002). This suit was dismissed by United States District Judge Ellen Huvelle on October 9, 2002. Defs.'

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[20] The Court notes that the defendant has stated that "[i]t is perhaps an understatement to suggest that plaintiff's complaint is difficult to understand." Defs.' Mem. at 4. The Court agrees and has attempted to construe the *pro se* plaintiff's complaint liberally. See *Warren* v. *District of Columbia*, 353 F.3d 36, 37 (D.C. Cir. 2004) (citations omitted).

Mem. at 6. On May 14, 2003, the United States Court of Appeals for the District of Columbia Circuit affirmed Judge Huvelle's decision and subsequently denied the plaintiff's requests for rehearings. *Id.* The plaintiff then filed a petition for a writ of certiorari with the Supreme Court, which was also denied. *Id.* at n.5.

In the suit currently before the Court, the plaintiff challenges Judge Huvelle's decision, alleging that he was the victim of judicial bias, activism, treason, and perjury. Compl. at 6-8, 28-34. He also contends that Judge Huvelle violated his rights to petition and his right to due process. *Id.* at 8-9. In addition, the plaintiff appears to be challenging the decision making process of the Supreme Court based on his view that the Court is politicized and looks for guidance from other countries' court decisions. *Id.* at 11-14 The plaintiff also complains that his rights under the Declaration of Independence have been violated. *Id.* at 9-11. Further, because the plaintiff believes firearm ownership is a protected constitutional right, he asserts that the executive, legislative, and judicial branches have made fraudulent and false statements in violation of 18 U.S.C. §§ 1001, 1018, 1031(a)(1) for speaking out against the plaintiff's view. *Id.* at 14-15. He also complains of various violations of the RICO statute – 18 U.S.C. §§ 1951(a), 1959, 1962, and 1964(c) – for which he seeks $30 million dollars[21] in damages. *Id.* at 15-27, 35. The plaintiff also alleges that the Attorney

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[21] Petitioner's error. The correct amount would have been $9 million dollars. Petitioner's error was in rounding up the $9 million to $10 million and erroneously applying the RICO 3-fold provision a second time, arriving at that $30 million dollar amount. This erroneous calculation was due, in part, to the complicated nature of the case.

General failed to investigate the purported RICO violations. Id. at 27-28. Finally, the plaintiff seeks relief under the Federal Torts Claim Act ("FTCA"). Id. at 34. In addition to the relief of RICO damages demanded by the plaintiff, he again requests from the Court writs of mandamus, a writ of prohibition, injunctive relief, and declaratory judgements concerning his rights under the Second Amendment. Id. at 35-37.

II. Standard of Review

(A) Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) requires that the plaintiff bear the burden of establishing by a preponderance of the evidence that the court has jurisdiction to entertain his claims. Fed. R. Civ. P. 12(b)(1); Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (holding that the court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority."); *Pitney Bowes, Inc.* v. *United States Postal Serv.*, 27 F. Supp. 2d 15, 18 (D.D.C. 1998). While the Court must accept as true all the factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1), *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), because the plaintiff has the burden of proof to establish jurisdiction, the " 'plaintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge of Fraternal Order of Police*, 185 F. Supp. 2d at 13-14 (citation omitted). Finally, the Court notes that in deciding a Rule 12(b)(1) motion, it is well established in this Circuit that a court is not

limited to the allegations in the complaint but may consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case. *See EEOC* v. *St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624-25 n.3 (D.C. Cir. 1997); *Herbert* v. *Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992); *Haase* v. *Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987); *Hohri* v. *United States*, 782 F.2d 227, 241 (D.C. Cir. 1986); *Grand Lodge of Fraternal Order of Police*, 185 F. Supp. 2d at 14.

(B) Rule 12(b)(6)

As an initial matter, the plaintiff's pleadings must be liberally construed because he is a *pro se* litigant. *Warren* v. *District of Columbia*, 353 F.3d 36, 37 (D.C. Cir. 2004) (citations omitted). On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court must construe the allegations and facts in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the alleged facts. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); *Kowal* v. *MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). However, the Court need not accept inferences or conclusory allegations that are unsupported by the facts set forth in the complaint. *Kowal*, 16 F.3d at 1276. In deciding whether to dismiss a claim under Rule 12(b)(6), the Court can only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference into the complaint, and matters about which the Court may take judicial notice. *St. Francis*, 117 F.3d at 624-25. The Court will dismiss a claim pursuant to Rule 12(b)(6) only if the defendant can demonstrate "beyond

doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.

III. Legal Analysis

A. Has the Plaintiff Conceded the Defendants' Motion to Dismiss?

This Court's Local Rule 7(b) states:

> Within 11 days of the date of service or at such other time as the court may direct, an opposing party shall serve and file a memorandum of points and authorities in opposition to the motion. If such a memorandum is not filed within the prescribed time, the court may treat the motion as conceded.

D.D.C. R. 7(b). The District of Columbia Circuit has stated that "the discretion to enforce . . .

[R]ule [7(b)] lies wholly with the district court," Bender, 127 F.3d at 67-68 (citing *Twelve John Does* v. *District of Columbia*, 117 F.3d 571, 577 (D.C. Cir. 1997)), and noted that it "ha[s] yet to find that a district court's enforcement of this rule constituted an abuse of discretion." Id. (citations omitted). Another district court has commented that a "court may grant defendant's motion if: (1) the *pro* se plaintiff has received adequate notice that failure to file any opposition may result in dismissal of the case . . . [because] failure to file opposition papers would result in the motion being decided unopposed." *Mercado v. Division of New York State Police, No. 96* Civ. 0235 (PKL), 2001 WL 563741, at *7 (S.D.N.Y. 2001).

Here, because the plaintiff had adequate opportunity to respond to the defendants' motion to dismiss, but

nevertheless failed to file a response with this Court, the Court will treat the positions advanced by the defendant as conceded. Not only did the plaintiff fail to respond within the 11 days prescribed by the rule, he has also not filed his opposition within the additional time allotted to him by this Court in its July 15, 2004 Order. Standing alone, the concession resulting from the failure to respond to the defendant's motion is sufficient reason to dismiss the plaintiff's claims. Alternatively, however, even if the plaintiff had responded to the defendants' motion to dismiss, the defendants' motion would still be granted for all of the reasons that follow.

B. Are the Judges Being Sued Entitled to Absolute Immunity?

All of the plaintiff's claims lodged against judges named as defendants must be dismissed because they are all entitled to absolute immunity. "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Cleavinger* v. *Saxner*, 474 U.S. 193, 199 (quoting *Pierson* v. *Ray*, 386 U.S. 547, 553-54 (1967)). "[J]udicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles*, 502 U.S. 9, 11 (1991) (citing *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985)). Judicial "immunity applies 'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.'" *Cleavinger*, 474 U.S. at 199-200 (quoting *Bradley* v. *Fisher*, 13 Wall. 335, 347 (1872)). Judicial immunity applies even when a judge is "accused of acting maliciously and corruptly." *Mireles* v. *Waco*, 502 U.S. at 11 (quoting *Pierson*, 386 U.S. at 554). A judge's absolute immunity can only be waived if the judge is

acting in a nonjudicial capacity or if his actions were taken in the complete absence of his jurisdiction. *Id.* at 11-12 (citations omitted).

All of the plaintiff's claims against the judicial defendants challenge actions taken by the judges in their judicial capacities. Evidentially, the plaintiff's grievances are directed at Judge Huvelle for dismissing his prior lawsuit, the Court of Appeals judges for affirming that decision, and the Supreme Court justices for not granting his petition of certiorari. Clearly, all of these actions were taken by the judges and justices in their judicial capacities. The action taken by these defendants was also within the judicial defendants' jurisdiction because the plaintiff's claims relate to civil litigation brought in federal courts. And, when a plaintiff chooses a forum, he cannot argue that jurisdiction in that forum does not exist. *Tinsley* v. *Widener*, 150 F. Supp. 2d 7, 12 (D.D.C. 2001). Accordingly, absolute immunity bars all of the plaintiff's claims against the judicial defendants.

C. Does the Doctrine of Res Judicata Bar the Plaintiff's Writ Claims?

Claim preclusion prevents relitigation of the same claims or causes of action between the same parties or their privies when a final judgment has been entered in a previous case. *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 502 (2001) (citation omitted). Claim preclusion applies not only to issues already litigated, but also to claims which could or should have been brought in the prior litigation. *Nevada* v. *United States*, 463 U.S. 110, 129 (1983). Suits will be barred by the doctrine of claim preclusion when there is

> (1) an identity of the cause of action in both suits; (2) an identity of parties in both suits; (3)

> a final judgment on the merits; and (4) a judgment rendered by a court of competent jurisdiction.

Does v. *District of Columbia*, 238 F. Supp. 2d 212, 217 (D.D.C. 2002) (citations omitted).

Applying these factors to this case, the Court concludes that all four elements are satisfied and therefore claim preclusion prohibits the plaintiff from pursuing his claims for alleged violations of the Declaration of

Independence,[22] fraudulent and false statements,[23] and

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[22] The plaintiff seeks to assert various claims under the Declaration of Independence, including challenges to state and federal gun control laws, federal laws restricting the transport of firearms, and the denial of his Merchant Mariner's Document. Compl. at 9-14. These same claims were advanced in his prior case and were dismissed by Judge Huvelle. Two other alleged violations of the Declaration of Independence — that the plaintiff's original suit was assigned to a judge appointed by President Clinton and, therefore, he was the victim of judicial bias because President Clinton was "THE most anti-Second Amendment president this nation has had" and that the Supreme Court is not properly interpreting the Constitution — are nothing more than rehashed allegations against these judicial officers that have already been dismissed because they are protected by absolute immunity. Their reassertion as purported Declaration of Independence claims therefore need not be addressed again.

[23] The plaintiff alleges that some of the defendants made fraudulent and false statements in violation of 18 U.S.C. §§ 1001, 1018, 1031(a)(1) when the federal courts issue opinions restricting the Second Amendment, when congressional members have submitted gun control legislation to the President, and when the President signed these bills into law. Compl. at 15. Again, any claims against the judicial defendants must be dismissed because they are shielded by absolute immunity. Regarding the congressional and presidential involvement in adopting gun control laws, these actions fall within the same "nucleus of fact" of the actual laws in which the plaintiff has already challenged in his previous action. As the defendants point out, claim preclusion bars "not only claims which were raised in the first action, but also claims which *should or could have been raised* during the prior litigation." *Does*, 238 F. Supp. 2d at 217 (emphasis added). As a result, the plaintiff's fraudulent and false statements claims should have been brought in the plaintiff's initial action and they are barred by the doctrine of claim preclusion. Finally, the Court notes that the plaintiff is precluded from asserting any claims pursuant to 18 U.S.C. §§ 1001, 1018, 1031(a)(1) because, as criminal statutes,

claims brought pursuant to the FTCA.

First, an identical cause of action involves the same " 'nucleus of facts' surrounding a transaction, rather than the legal theories utilized by the parties." *Id.* (citing *Page* v. *United States*, 729 F.2d 818, 820 (D.C. Cir. 1984)). Here, as the defendants point out, the plaintiff's first suit, as well as the case currently before the Court, involves the same denial of an endorsement of the plaintiff's Merchant Marine document and the same challenges to the federal policies, statutes, and regulations regarding gun control. *Hamrick* v. *Bush*, Civil Action No. 02-1435 (D.D.C. Oct. 9, 2002). Further, even if some of the current claims for writs of mandamusor prohibition differ from the previous action they could or should have been raised in the first case and therefore fall within this first prong of the claim preclusion test. *See Does*, 238 F. Supp. 2d at 217 (citing *Nevada*, 463 U.S. at 129).

Second, the parties in the plaintiff's first suit and the present suit are the same, except that the plaintiff has included additional federal officials as defendants in his second action. Defs.' Mem. at 9. However, these added federal officials are in privity with those defendants in the first suit, and "it is well-established in federal courts that a litigant and those in privity with the litigant can be bound by an earlier judgment and precluded from bringing subsequent legal actions that raise the same issues or claims." *Am. Forest Council* v. *Shea*, 172 F. Supp. 2d 24, 30-31 (D.D.C.

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they do not convey a private right of action. *See Rockefeller* v. *United States Court of Appeals Office for the Tenth Circuit Judges*, Civil Action No. 01-2627 (D.D.C. Feb. 10, 2003) (Walton, J.). Therefore, the Court must dismiss the plaintiff's claims brought pursuant to 18 U.S.C. §§ 1001, 1018, 1031(a)(1).

2001). In this case, as in *Shea*, the parties are in privity "because their interests are 'so closely aligned' and were 'sufficiently represented' in [the original action.]" *Id.* at 31.

Third, Judge Huvelle issued a final judgment on the merits in the plaintiff's initial case when she denied the plaintiff's mandamus petition for "not meet[ing] the demanding standards necessary to warrant such relief . . . ." Defs.' Mem. at 10. The final element of the claim preclusion test is also satisfied because the previous judgment was rendered by a court of competent jurisdiction.

Because the requirements of all four elements of claim preclusion have been met, the plaintiff's claims related to the denial of his Merchant Marine document, as well as his claims regarding federal gun control policies, statutes, and regulations, must be dismissed for failure to state a cause of action upon which relief can be granted. *See Coleman* v. *Potomac Elec. Power Co.*, 310 F. Supp. 2d 154 (D.D.C. 2004) (dismissing plaintiff's claims pursuant to Rule 12(b)(6) based, in part, on res judicata).

D. Have the Defendants Waived Their Sovereign Immunity Regarding the RICO Claims?

The plaintiff's claims for racketeering against the Second Amendment, Compl. at 15-16, for prohibited racketeering activities under 18 U.S.C. § 1962, Compl. at 16-27, and against the Attorney General for his failure to investigate these supposed RICO violations, Compl. at 27-28, must be dismissed because the defendants have not waived their sovereign

immunity.[24] Cases 4 that involve government officials being sued in their official capacity " 'generally represent only another way of pleading an action against an entity of which the officer is an agent[,]' [which] 'is, in all respects other than name, to be treated as a suit against the entity.' " *Kentucky* v. *Graham*, 473 U.S. 159, 165-66 (1985) (citations omitted). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC* v. *Meyer*, 520 U.S. 471, 475 (1994) (citations omitted). Thus, "the United States may not be sued without its consent and [] the existence of consent is a prerequisite for jurisdiction." Id. (citation omitted). If, then, government officials have been sued by the plaintiff in their official capacity, and the government has not consented to waive its sovereign immunity, this Court must dismiss the RICO claims because it lacks subject matter jurisdiction. *See First Virginia Bank* v. *Randolph*, 110 F.3d 75, 77 (D.C. Cir. 1997). A waiver of sovereign immunity must be "unequivocally expressed in statutory text . . . ." *Lane* v. Pena, 518 U.S. 187, 192 (1996) (citations omitted).

In this case, the officials are clearly being sued in their official, and not their individual, capacity. "The definition of 'person' in RICO does not explicitly mention the federal government . . . [and] cannot, on its own, effect a waiver of the federal government's sovereign immunity" because such a waiver must be clear and unequivocal. *Donahue* v. *FBI*, 204 F. Supp. 2d 169, 174 (D. Mass. 2002) (citations omitted). Other

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[24] The Court notes that it is not clear from the plaintiff's complaint which defendants are the subject of his claims for racketeering against the Second Amendment and the prohibited racketeering activities under 18 U.S.C. § 1962.

courts have held that sovereign immunity is not waived under RICO when federal officials are acting in their official capacities because the waiver is not explicit. *Nat'l Commodity & Barter Ass'n* v. *Gibbs*, 886 F.2d 1240, 1246-47 (8th Cir. 1989) (citation omitted). *See also Deutsch* v. *DOJ*, 881 F. Supp. 49, 55 (D.D.C. 1995), aff'd 93 F.3d 986 (D.C. Cir. 1996). This Court agrees with that position and accordingly, the plaintiff's RICO claims against the government officials must be dismissed for lack of subject matter jurisdiction.

IV. Conclusion

For the reasons set forth above, the Court will grant the defendants' motion to dismiss because the plaintiff failed to respond to the defendants' motion, resulting in a concession of the defendants' motion according to Local Rule 7(b). However, even if the plaintiff had responded to the defendants' motion to dismiss, the Court would have to grant the defendants' motion to dismiss because the judicial defendants are not subject to suit due to absolute immunity, the government has not waived its sovereign immunity for the RICO claims, and the remaining claims are barred by the doctrine of claim preclusion.

SO ORDERED this 16th day of August, 2004.

APPENDIX E: Order Denying Seaman's Fee Exemption

United States Court of Appeals

For The District of Columbia Circuit

No. 02-5334 September Term, 2002

02cv01435

Filed On: Feb. 3, 2003

Don Hamrick, Appellant

v.

[President] George W. Bush, Jr., et al,

Appellees

BEFORE: Randolph, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of the court's order to show cause filed October 30, 2002; the motion for leave to appeal without payment of fees pursuant to 28 U.S.C. § 1916; the motion to invite amicus curiae briefs; the motion for rulings on motions dismissed as moot by the district court; the motion to substitute a party; the motion for publication; the motion for leave to file an appendix; the motion for the issuance of subpoenas; the motions for judicial notice of adjudicative facts and the

supplement thereto; and the motion for leave to file a petition for a writ of certiorari, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for leave to appeal without payment of fees pursuant to 28 U.S.C. § 1916 be denied. Appellant has not demonstrated that his appeal is one for "wages or salvage or the enforcement of laws enacted for [his] health or safety" as a seaman. 28 U.S.C. § 1916. It is

FURTHER ORDERED on the court's own motion, that within 30 days of the date of this order, appellant must either pay the $100 appellate docketing fee and the $5.00 filing fee to the Clerk of the District Court, see Fed. R. App. P. 3(e); 28 U.S.C. § 1917, or file a motion in the District Court for leave to proceed on appeal in forma pauperis, see Fed. R. App. P. 24(a)(1). Failure to comply with this order will result in dismissal of the appeal for lack of prosecution. See D.C. Circuit Rule 38. It is

FURTHER ORDERED that consideration of the remaining motions be deferred pending further order of the court.

The Clerk is directed to send a copy of this order to appellant both by certified mail, return receipt requested, and by first class mail.

Per Curiam

[initials: ppn?]

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APPENDIX F: Case Law In Rebuttal to Order Denying Right to Seaman's Suit Law of 28 U.S.C. § 1916

"The due process clause forbids arbitrary deprivations of liberty; where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the clause must be satisfied." *Goss* v. *Lopez*, 419 US 565, 95 S.Ct. 729, 42 L.Ed. 725. "When those fundamental rights which are recognized and declared, but not granted or created, by the Constitution, are thereby guaranteed only against violation or abridgment by the United States or by the states, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals, yet every right created by, arising under, or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as it may deem best." *Logan* v. *United States* 144 US 263, 12 S.Ct. 617, 36 L.Ed. 429. "If not warranted by any just occasion, the least imposition is oppressive." *Mountain Timber Co.* v. Washington, 243 US 219, 37 S.Ct. 260, 61 L.Ed. 685. "The constitutional guaranty of rights and immunities to the citizen insures to him the privilege of having those rights and immunities judicially declared and protected." *Lawrence* v. *State Tax Commission*, 286 US 276, 52 S.Ct. 556, 87 ALR 374, 76 L.Ed. 1102.

MOTION FOR JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(RULE 201 OF THE FEDERAL RULES EVIDENCE):

The U.S. District Court for the District of Columbia accepted petitioner's cases (1:02cv01434 & 1:02cv01435

filed July 18, 2002) as seaman's suits (28 U.S.C. § 1916) without the prepayment of filing fees, costs or furnishing security therefor because the cases involved "the enforcement of laws enacted for safety" because they involve the right of personal security (i.e. safety) through the Second Amendment right to keep and bear arms.

HISTORICAL AND REVISION NOTES ON THE SEAMAN'S SUIT LAW (28 U.S.C. 1916)

June 12, 1917, ch. 27, Sec. 1, 40 Stat. 157 (H.R. 11; Pub.L.No. 21: An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes.) — *Provided further,* That courts of the United States shall be open to seamen, without furnishing bonds or prepayment of or making deposits to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for the own benefit for wages or salvage and to enforce laws made for their health and safety;

July 1, 1918, ch. 113, Sec. 1, 40 Stat. 683 (H.R. 12441; Pub.L.No. 181: An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirteenth, nineteen hundred and nineteen, and for other purposes.) — *Provided,* That courts of the United States, including appellate courts, hereafter shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own

benefit for wages or salvage and to enforce laws made for their health and safety.

June 25, 1948, ch. 646, 62 Stat. 955 (H.R. 3214; Pub.L.No. 773: An Act: To revise, codify, and enact into law title 28 of the United States Code entitled "Judicial Code and Judiciary") — 28 U.S. 1916: In all courts of the United Stats, seamen may institute and prosecute suits and appeals in their own names and for their own benefit for wages or salvage or the enforcement of laws enacted for their health or safety without prepaying fees or costs or furnishing security therefor.

NOTHING IN THE LEGISLATIVE HISTORY EVEN MENTIONS INDIGENCY OR IN FORMA PAUPERIS!

WHEN IS PROCESS DUE.[25]

"The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[26] "The very nature of due process negates any concept of inflexible

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[25] *See* CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 1735 (1992).

[26] *Goldberg* v. *Kelly*, 397 U.S. 254, 262–63 (1970), (quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Justice Frankfurter concurring)).

procedures universally applicable to every imaginable situation."[27] Due process application, as has been noted, depends upon the nature of the interest; the form of the due process to be applied is determined by the weight of that interest balanced against the opposing interests. The currently prevailing standard is that formulated in Mathews v. Eldridge.[28] "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors:

> **first**, the private interest that will be affected by the official action;
>
> **second**, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and,
>
> **finally**, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

THE DOCTRINE OF PRIOR RESTRAINT[29]

"[L]iberty of the press, historically considered and taken up by the Federal Constitution, has

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[27] Citing *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 894–95 (1961).

[28] 424 U.S. 319, 335 (1976).

[29] *See* CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 1029 (1992)

meant, principally although not exclusively, immunity from previous restraints or censorship."[30] "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[31] Government "thus carries a heavy burden of showing justification for the imposition of such a restraint."[32] Under the English licensing system, which expired in 1695, all printing presses and printers were licensed and nothing could be published without prior approval of the state or church authorities. The great struggle for liberty of the press was for the right to publish without a license that which for a long time could be published only with a license.[33]

RIGHT TO PETITION[34]

It is no longer confined to demands for "a redress of grievances," in any accurate meaning of these words, but comprehends demands for an exercise by the Government of its powers in

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[30] *Near* v. *Minnesota* ex rel. *Olson*, 283 U.S. 697, 716 (1931).

[31] *Bantam Books* v. *Sullivan*, 372 U.S. 58, 70 (1963).

[32] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

[33] *Near* v. *Minnesota* ex rel. *Olson*, 283 U.S. 697, 713–14 (1931): Lovell v. Griffin, 303 U.S. 444, 451 (1938).

[34] *See* CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 1188 (1992)

furtherance of the interest and prosperity of the petitioners and of their views on politically contentious matters.[35] The right extends to the "approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition."[36]

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[35] See *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight*, 365 U.S. 127 (1961).

[36] *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972). See also NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913–15 (1982); Missouri v. NOW, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980) (boycott of States not ratifying ERA may not be subjected to antitrust suits for economic losses because of its political nature).

APPENDIX G: Doctrine of Unconstitutional Conditions

DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

It is most appropriate to include herein a brief discussion on the Doctrine of Unconstitutional Conditions as necessary to a full understanding of Appellant's cause of action. Appellant will excerpt portions from Kathleen M. Sullivan's, *Unconstitutional Conditions*, 10 Harv.L.Rev. 1413 (May 1989) that best describes Appellant's argument challenging the constitutionality of laws prohibiting National Open Carry Handgun and many other freedoms under the Bill of Rights associated with firearms possession, ownership, usage, and carriage for the purpose of personal security in dual-dependency relationship to the constitutional right to travel. The following are excerpts from Sullivan's law review (footnotes from original omitted):

> *Basic constitutional jurisprudence dictates that courts subject most government benefit decisions to minimal scrutiny, but scrutinize government actions that directly burden preferred liberties more closely. Unconstitutional conditions problems arise at the boundary between these two directives: when government conditions a benefit on the recipient's waiver of a preferred liberty, should courts review the conditioned benefit deferentially, as a benefit, or strictly, as a burden on a preferred liberty? . . . Professor Sullivan criticizes traditional analyses of unconstitutional conditions for focusing wrongly on whether conditions coerce individuals, distort legislative process, or permit alienation of constitutional rights. She articulates an*

alternative defense of close scrutiny, arguing that rights-pressuring conditions on government benefits skew distribution of power between government and rightholders, as well as among rightholders themselves. Professor Sullivan then develops this systemic approach, detailing both the circumstances in which courts should apply close scrutiny, and those in which government justifications may be strong enough to survive such scrutiny.[37]

The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt. (Id. at 1415)

[A]ssuming that some set of constitutionally preferred liberties has been agreed upon, and that burdens on those liberties require especially strong justification, unconstitutional conditions doctrine performs an important function. It identifies a characteristic technique by which government appears not to, but in fact does burden those liberties, triggering a demand for especially strong justification by the state.

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[37] Kathleen M. Sullivan, "*Unconstitutional Conditions*," 102 Harv.L.Rev. 1413 (May 1989), introduction. Italics in original.

Part I of this Article defines the basic elements of the technique. (Id. at 1419)

The central challenge for a theory of unconstitutional conditions is to explain why conditions on government benefits that "indirectly" pressure preferred liberties should be as suspect as "direct" burdens on those same rights, such as the threat of criminal punishment. (Id. at 1419)

"IV. Unconstitutional Conditions as Commodification"

Unconstitutional conditions doctrine has a third possible theoretical explanation: that some constitutional rights are inalienable, and therefore may not be surrendered even through voluntary exchange. This approach identifies the harm in unconstitutional conditions as the commodification of rights the treatment of rights as transferable objects. (Id. at 1477)

1. Paternalism.

Making constitutional rights inalienable because citizens may undervalue the worth of those rights to themselves would be classic paternalism overruling individuals' choices for their own good. Individuals' choices may diverge from their "best" interests for many reasons: for example, because they underassess risk or under-value their long-term interests. Choices to waive constitutional rights are no exceptions; invalidating such choices, even if perfectly voluntary, compels citizens to hang onto their rights for their own good. (Id. at 1480)

. . . The very existence of constitutional rights, however, unlike consumer tastes or preferences, results from the prior "paternalistic" act of enacting a Constitution. The framers' decision to place constitutional rights beyond majority decisionmaking reflects the prediction that citizens will undervalue those rights in the ordinary course of politics. Constitutional rights thus represent commitments by a constitutional majority to override the acts of future political majorities' political version of Ulysses and the Sirens. If the Constitution overrides the legislative choices of improvident future political majorities, why not the trading choices of improvident future individual rightholders? This approach would conceive unconstitutional conditions doctrine as a mere backstop to constitutionalism itself, which among other things, places rights beyond the reach of politics because citizens, if left to their own devices, will squander them. (Id. at 1480-81)

4. *Personhood.*

Another sort of argument defends inalienability not because it promotes efficiency or equality, but because some things ought not to be traded on markets at all. Such wholesale anti-commodification arguments rest on various theories. Some, for example, view market boundaries as essential to a distinction between the sacred and the profane. On such a view, reverence, mystery, and awe for something depend on its freedom from the pollution of trade. A second variant argues that noncommodi-ficiation can help preserve social norms of altruism or donation. (Id. at 1484)

Such a "personhood" approach would hold that the opportunity to exchange rights for benefits wrongly commodifies rights. . . . Inalienability here would follow from the view that constitutional rights, like body parts and love, but unlike clothes or mass-market consumer goods, are essential attributes of personal identity. The metaphor of constitutionally protected liberties as a "birthright" captures this view. Free transfer of such rights is a form of dismemberment. If citizens could purchase and sell constitutional rights, they would have a different and inferior conception both of those constitutional rights and of themselves. (Id. at 1485)

V. A Systemic Account of Unconstitutional Conditions

Neither coercion, corruption, nor commodification theories satisfactorily explain why conditions on benefits that pressure preferred liberties should receive the same strict scrutiny as "direct" constraints. . . . None of these three approaches suffices: coercion theory focuses too narrowly on the individual beneficiary, germaneness theory focuses wrongly on [the corruption of the] legislative process, and inalienability theory focuses too generally on problems with exchange. (Id. at 1489-90)

This Part argues for an alternative approach grounded in the systemic effects that conditions on benefits have on the exercise of constitutional rights. Such an approach starts from the proposition that the preferred constitutional

liberties at stake in unconstitutional conditions cases do not simply protect individual rightholders piecemeal. Instead, they also help determine the overall distribution of power between government and rightholders generally, and among classes of rightholders. (Id. at 1490)

Unconstitutional conditions, no less than "direct" infringements, can skew this distribution in three ways.

First they can alter the constitutional liberties generally declare desirable some realm of autonomy that should remain free from government encroachment. Government freedom to redistribute power over presumptively autonomous decisions from the citizenry to itself through the leverage of permissible spending or regulation would jeopardize that realm. Second, an unconstitutional condition can skew the distribution of constitutional rights among rightholders because it necessarily discriminates facially between those who do and those who do not comply with the condition. If government has an obligation of evenhandedness or neutrality with regard to a right, this sort of redistribution is inappropriate. Third, to the extent that a condition discriminates de facto between those who do and do not depend on a government benefit, it can create an undesirable caste hierarchy in the enjoyment of constitutional rights. (Id. at 1490)

A. Constitutional Liberty as Distribution

A systemic approach to unconstitutional conditions problems recognizes that

constitutional liberties regulate three relationships: the relationship between government and rightholders, horizontal relationships among classes of right holders, and vertical relationships among rightholders. . . . rights-pressuring conditions on government benefits potentially skew all three. (Id. at 1491)

Such an approach has important advantages over coercion, germaneness, and inalienability theories in illuminating unconstitutional conditions problems. Unlike coercion and unalienability theories, a systemic approach emphasizes the distinctive role of government: citizens' transactions with government require different analysis than interpersonal transactions, an analysis that focuses not on individuals but on the balance of power and freedom in the polity as a whole. (Id. at 1491)

APPENDIX H: How Stare Decisis Subverts the Law

HOW STARE DECISIS SUBVERTS THE LAW

Jon Roland[1]
Constitution Society
2000 June 10
(Updated: 2004 August 5)

> "[*Stare decisis*] *is a maxim among ... lawyers, that whatever has been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind.*"—Jonathan Swift, Gulliver's Travels.

One of the most important doctrines in Western law is that of *stare decisis*, a Latin term of art which means "to stand by decided cases; to uphold precedents; to maintain former adjudications".[2] In modern jurisprudence, however, it has come to take on a life of its own, with all precedents being presumed to be well-founded, unbiased legal decisions, rather than political decisions, and presumed to have both the authority of the constitutional enactments on which they are based, plus that of the precedents on which they are based, so that later precedents are presumed to be more authoritative than earlier ones.

The doctrine also tends to give great weight to the opinion in the case, even to the point of treating the opinion as though it was law, even though only the

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[1] http://www.constitution.org/col/jrcolndx.htm

[2] Henry Campbell Black, *A LAW DICTIONARY*, 2nd ed., New York: West Pub., 1910.

order and findings have the actual force of law, and only in that case, and an explanation of how the decision was reached is only dictum, or commentary. This means that a poorly-worded opinion can define a set of legal positions that exceed the bounds of the underlying constitutional enactments, and become the basis for future precedents, as though they were constitutional enactments themselves. The problem is exacerbated by the failure of judges to clearly delineate the boundaries between edict and dictum.

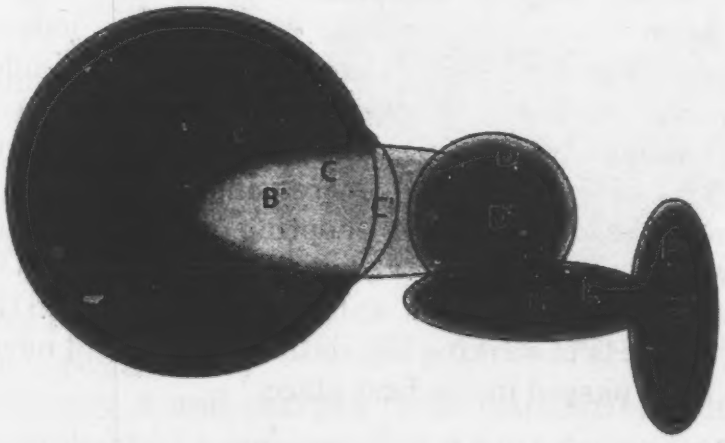
The doctrine tends to disfavor legal argument that precedents were wrongly decided, especially if they are precedents established at a higher level in the appeals hierarchy, and to demand the litigants "distinguish" their cases from adverse precedents, arguing that those precedents do not apply to the present case because of elements that make it different from the cases on which the precedents were established. This can be very difficult to do if there are a great many recent cases on the same issues which cover most of the possibilities.

The situation can be made more difficult by the rules of most courts which limit the length of briefs the litigants may file. In working backward through a long line of wrongful precedents, a litigant can reach the length limit before the argument can make it back to the foundations where the chain of precedents began to drift away from its authority in the constitutional enactments.

The situation can be illustrated by the Venn diagram in Figure 1, in which the first set A represents the set of legal positions consistent with the Constitution, and the points outside the circle represent unconstitutional positions. It is noted that

the boundary of the set is fuzzy, representing the ambiguity of interpretation at the boundary. The central point B' represents a court decision whose opinion defines a set of legal positions consistent with it, shown by the elliptical set with the letter B at the top, but a portion of that set extends beyond the bounds of A. The opinion in the next decision C' also falls within A and defines yet another region C of consistent positions, but which extends beyond both A and B. Decision D' falls within C, but not A or B, and further defines a consistency set that extends beyond A, B, and C. The Decision E' doesn't lie within any of the regions defined by the previous precedents, but its region of consistency overlaps D and barely C, the kind of situation that might result from a legal argument that reaches to get a political decision not based on precedent. Finally, the last decision F' is based on E

Figure 1.



defines consistency set F but lies entirely outside A, B, C, and D.

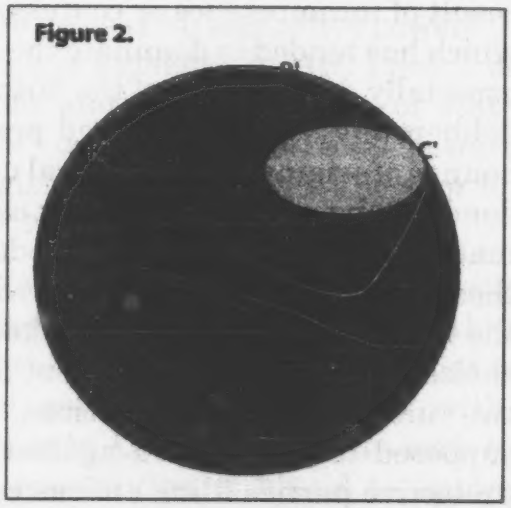
The problem for jurisprudence, especially constitutional jurisprudence, is how to get back within A when one's opponent's position is supported by F and one cannot distinguish precedents taking the argument back to A within the brief page limits. It may be almost impossible unless or until one can get the case to the Supreme Court, which can ignore and reverse its own precedents, but which can take only about 75 cases a year, and is reluctant to issue sweeping opinions that can cover a large number of cases that might otherwise deserve to be granted certiorari, but which will never make it because the litigants are discouraged from making fundamental arguments that might work with the Supreme Court but which would be disfavored by lower courts.

It is difficult to estimate how many unconstitutional legislative provisions are adopted each year by Congress, but a plausible number is more than 20,000, or about as many as the number of bills introduced each year. There is simply no way that the federal courts can handle all the cases that might arise under that many provisions. They are almost forced to rely on the presumption of constitutionality of statutes, but members of Congress are increasingly reluctant to restrain themselves from adopting legislation they know to be unconstitutional, but which is supported by some of their constituents, and passing the duty to the federal courts of striking legislation that should never have been passed in the first place.

The way *stare decisis* is supposed to be used is indicated by the definition of it in Bouvier's Law Dictionary of 1856, which is closer to original practice and intent:

Stare decisis. To abide or adhere to decided cases.

2. It is a general maxim that when a point has been settled by decision, it forms a precedent which is not afterwards to be departed from. The doctrine of stare decisis is not always to be relied upon, for the courts find it necessary to overrule cases which have been hastily decided, or contrary to principle. Many hundreds of such overruled cases may be found in the American and English books of reports. Mr. Greenleaf has made a collection of such cases, to which the reader is referred. *Vide* 1 Kent, *Com.* 477; *Livingst. Syst. of Pen. Law*, 104, 5.[3]



This indicates that the way stare decisis is supposed to be used is to define the boundaries of the constitutional enactments, as shown in Figure 2, where the decisions B' ... L' lie on the fuzzy boundaries of the region of legitimacy A and sharpen those boundaries. This is accomplished by opinions that do not define a set of consistent propositions that extend beyond A. That is,

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[3] John Bouvier, *A LAW DICTIONARY*, Revised Sixth Edition, 1856.

every judge is careful to anticipate all the ways the words of his opinion might be misconstrued to support decisions beyond what is authorized by the constitutional enactments, and in particular, the Constitution.

There would appear to be only two ways out of our present predicament: Either the people must start electing different members of Congress, and demand that they strictly comply with the Constitution, or else the courts, especially the Supreme Court, need to start issuing sweeping opinions which overturn past precedents and strike down entire blocks of legislation.

However, the drift away from constitutional legitimacy represented by Figure 1 is not just the result of incompetence or confusion. There is a faction which has tended to dominate the federal government, especially during most of the 20th century, which has deliberately sought to extend precedents beyond the bounds of original constitutional understanding. It has done this by carefully selecting cases against weak or inadequately represented defendants, appealing only those cases they are sure they will win, and framing the arguments so that the judges often don't have a choice that is constitutional, but must choose between two unconstitutional positions. Ordinarily this is supposed to be guarded against by constitutionally protective parties filing amicus curiae briefs to argue a strict constructionist position, but such briefs are not always filed in important cases, or are often ignored by the court.

The Supreme Court, beginning with the decision in *United States* v. *Lopez*,[4] 514 U.S. 549 (1995), and

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[4] http://www.constitution.org/ussc/514-549_.htm

continuing in 2000 with several decisions like *United States* v. *Morrison*,[5] Docket 99-5 and *Jones* v. *United States*,[6] Docket 99-5739, which roll back the federal criminal legislation based on the Commerce Clause, is nevertheless still unwilling to issue sweeping opinions, but prefers to rely on narrowly constructed opinions that have the effect of introducing confusion and conflict into the system of precedents, perhaps in the hopes that lower courts will seize on them to create still more conflicts, which the Supreme Court will then only have to decide among, without drawing as much controversy to themselves as they would if they issued sweeping opinions.

By treating court opinions as though they are general law, and not just law for a particular case, we become accomplices in delegating legislative powers to judicial officials, which is forbidden by Art. I Sec. 1 of the U.S. Constitution and similar clauses of state constitutions, which delegate legislative powers exclusively to the legislative branch, and allow for no delegation of legislative power to other branches.

There is a fundamental logical problem with *stare decisis* as it is currently practiced, which is that it is a logically separate system of propositions that is independent of, and potentially inconsistent with, constitutional enactments. One who takes an oath to uphold the written constitution is bound to ignore precedents in conflict with it, and to rest decisions strictly on propositions that are logically derived from constitutional enactments, considering precedents only

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[5] http://www.constitution.org/ussc/99-0005_.htm

[6] http://www.constitution.org/ussc/99-5739_.htm

where they sharpen ambiguities in the language of the written enactments. To treat precedents as superior to constitutional enactments is to introduce contradictions into the law, and in any system of logical propositions, acceptance of a single contradiction accepts all contradictions, rendering every proposition logically undecidable. Contrary to the view of some judges, the law must be logical, or it is not law.

Stare decisis is the way judges seek the safety of the herd. We need to demand they exhibit more courage, and return to fundamental principles, resorting to *stare decisis* only when the positions lie on the fuzzy boundary of the region of legitimacy.

APPENDIX I: Charles W. Heckman of A Matter of Justice Coalition Comments on The Ninth Circuit's Interim Report: Task Force on Self-Represented Litigants.

THE NINTH CIRCUIT'S INTERIM REPORT: TASK FORCE ON SELF-REPRESENTED LITIGANTS COMMENTS ON THE NINTH CIRCUIT PRO SE TASK FORCE REPORT

By: Charles W. Heckman, Dr. Sci.
A Matter of Justice Coalition (AMOJ)[7]
Committee for the Ninth Circuit

I. BASIC SUMMARY OF THE TASK FORCE'S REPORT

The report of the Task Force summarizes the many problems faced by the United States courts when persons not educated or trained as attorneys attempt to present their own legal arguments in various kinds of proceedings. It then introduces a variety of proposals to reduce the problems identified by the Task Force members, ranging from simplifying procedures to enlisting the assistance of pro bono attorneys or law students to minimize procedural errors, present arguments in an objective way without introducing the emotional responses typically elicited when a person discusses personal conflicts, and give litigants a better understanding of legal and practical limitations to the actions of a court. It takes note of the fact that prior discussions of legal aspects of a lawsuit with an attorney often disabuse a litigant of misunderstandings of the law before the court is

[7]http://victimsoflaw.net/9thcircuit2.htm

required to instruct the litigant about erroneous principles on which a lawsuit is based.

The recommendations of the task force are practical and include suggested improvements that would alleviate many of the problems addressed. Most of these suggestions can be accepted, and it is hoped that resources can be found to effect the improvements.

What must be faulted in this report is not the solutions proposed for the problems presented but rather the failure to address the most frequent complaints of *pro se* litigants, which are similar to complaints frequently voiced by litigants represented by attorneys with average or less than average capabilities.

II. Fundamental Role of the Judiciary

In 1947, Justice William O Douglas wrote that the basic function of any court is to judge the case on the merits. That means that two factors and only two should influence the decision: the law and the facts. If all is functioning as it should, then any case in which the facts indicate that one party must prevail under the law should have only one outcome. This is true regardless of whether or not the party whose case is supported by the law and the facts is represented by counsel.

Justice should not depend upon whether or not a person can afford a lawyer. While it is true that a litigant acting *pro se* might be less likely to present a clear case than an experienced lawyer and might not be able to cite all of the laws that might support his case, if the facts support any claim he makes under any law, he should prevail. If a litigant arguing his own case lets his emotions show, thereby provoking a

negative reaction, or if the litigant lacks skill in expressing himself, it is understandable that he may suffer disadvantage where the facts are not altogether clear. However, it is the function of a court, especially the jury, to sort through the evidence presented and provide a decision in accord with the law and facts, even if some extra effort has to be exerted. Any court that permits factors other than the law and the facts to influence the outcome of any proceeding has failed in its fundamental duty.

III. Problems Not Addressed in the Report

A. The Role of Bias

One of the many serious complaints often voiced by litigants but not seriously addressed in the report of the Task Force is bias by the judge. However, the report clearly expresses a common attitude toward *pro se* litigants, starting of p. 6 of the report:

> "Some judges and lawyers are convinced, for example, that *pro se* litigants as a class generally bring meritless claims, and that any program designed to educate or assist them would only increase the number of meritless claims in the court system. This point of view is doubtless influenced by those *pro se* cases that are brought by individuals suffering from a mental disability or for purposes of harassment. Closely related to that thought is the belief that appointing attorneys for *pro se* clients is a waste of resources and in the long run simply complicates efforts to keep the system clear of meritless cases."

The Task Force fails to identify who holds this opinion, but both lawyers and judges have frequently

expressed it or opinions very much like it. The main focus of this task force should not be with methods by which unbiased judges can make the submissions of *pro se* litigants easier for the court to deal with but rather with developing methods to assist a *pro se* litigant who has been the victim of a judge with the preconception that whatever he submits to the court is without merit, and his lawsuit must be dismissed before any unnecessary time of the court is wasted.

If all judges were perfect human beings, we could assume that the private opinion of a lawyer or a judge would not be reflected the judge's rulings. However, we know that few people approach perfection, and prejudice by decision-makers against members of certain groups has been the cause of continuous, bitter conflict since the civil rights movement first brought the effects of biases of many kinds to public view.

Prejudices often have a greater impact on the outcome of administrative hearings and lawsuits than parties with an obligation to be impartial like to admit. Whether the prejudice is deliberate and malicious or entirely unintended, decisions colored by personal biases can be just as devastating to the victims of the resulting injustice.

An even more enlightening articulation of the prejudice litigants often face appeared in numerous discussions on the decision of a Washington State appeals court in *Hill* v. *BCTI Income Fund*, 97 Wn. App. 657 (1999), later upheld by the Washington State Supreme Court. Although it is the decision of a state court, it draws on the en banc opinion of the U. S. Court of Appeals for the Second Circuit in *Fisher* v. *Vassar College*, 70 F.3d 1420, 1437 (2d Cir.). The opinion in *Hill* v. *BCTI* defends a school of thought

within the legal profession, which has been having a revolutionary effect on American jurisprudence. It parallels the controversial theory of a "living constitution," which condones the "updating" of the United States Constitution by the courts to conform to the personal opinion of judges concerning what the public wants and will accept. On a more mundane level, this revolution in judicial theory is interpreted by many judges as a mandate to quickly dismiss any lawsuit that can be dismissed without causing a public outcry, regardless of the merits of the case.

One of the main innovations introduced by the decision in *Fisher* v. *Vassar* is the acceptability and utility of lying to the court. This was discussed at length in a dissenting opinion by the Chief Judge of the Court of Appeals of the Second Circuit, who pointed out the implications of the decision reached by his colleagues. Briefly stated, a jury of the trial court had determined that the spokesmen for Vassar had lied about the reason Fisher was denied tenure. It therefore concluded that the prima facie case Fisher had established had not been rebutted, and the relief she had demanded was granted. The Second Circuit, en banc, reversed the decision of the trial court by a single vote, ruling that the non-discriminatory reason given for not granting Fisher tenure had eliminated her prima facie case, even though the reason was shown unequivocally to be a lie. With the case in favor of Fisher eliminated, the court opined that she was required to meet a higher level of proof, which was not defined by the court and was apparently not humanly possible to meet, at least without the services of a certified mind-reader.

Expanding on this legal opinion, the Washington State courts in *Hill* v. *BCTI* set an unattainable

burden of proof on a plaintiff who has alleged discrimination as soon as the defendant lies to the court and alleges that the motivation was not to discriminate against the plaintiff. According to the opinion of the Washington courts, proving conclusively that the defendant's allegation was a lie is not enough for a plaintiff to prevail. He must prove that the motive of the plaintiff was to discriminate against him for the reason alleged in the complaint. Hence, if age discrimination is alleged, the plaintiff must prove that the real reason for the discriminatory action and the subsequent lie by the defendant was actually the age of the plaintiff and not, for example, his religion, race, or gender. The judges of the Washington State Court of Appeals were well aware of the fact that the opposite decision had been reached by the United States Supreme Court, but they reasoned that the Supreme Court was wrong and the State of Washington was free to decide contrary to the highest Federal court because the State of Washington has its own constitution and its courts are therefore not bound by the United States Constitution, as interpreted by the Federal judiciary.

What is interesting about this case in the context of *pro se* litigation is not the decision itself but rather the opinion of an author who defended the decision as vital to preserve the integrity of the judicial system. He stated clearly in his article that if one person came to a court with a discrimination complaint and obtained relief, this would encourage other litigants to file similar lawsuits, and there are already too many lawsuits being filed. There is a strong undercurrent within the legal profession, as well as among corporations that are frequently sued, propagating the opinion that filing civil lawsuits is somehow sinister and un-American. They wish to discourage most

lawsuits by denying justice to litigants and thereby discouraging other litigants from seeking justice in a court.

While there is a tradition from the Old West that a man settles his disputes by shooting it out with his adversary or settles lesser disputes with his fists, it was long thought that this was a less desirable alternative to letting a jury decide which party should prevail. Apparently, some members of the legal profession think otherwise and wish to close off the courts to ordinary citizens, returning dispute resolution to the means available in the "Wild West." It would be well to determine how closely the decrease in justice provided in civil suits has paralleled the increase in crimes of violence between people with no civilized means available to settle their dispute. How many of the civil disputes wrongfully dismissed or inequitably settled come back to the court as a criminal case?

The treatment of *pro se* litigants reflects the desire expressed by many politicians and judges that the number of lawsuits be reduced. Showing litigants who lack strong financial resources, the services of a first-class law firm, backing by an influential organization, or attention in the press that they have no chance of prevailing in a lawsuit or even of presenting their cases to a jury might well discourage other litigants from seeking redress in the courts but it also encourages persons in positions of authority to deliberately break the law, knowing that there is almost no chance that the victim would be able to obtain redress in a court of law.

It seems obvious to me that the flood of lawsuits is the result of a massive increase in white collar crime in

the United States, most of which is ignored by law enforcement authorities on the excuse that their time is needed to combat crimes of violence. The victims are therefore forced to attempt to obtain redress in a civil lawsuit, and most are unable to obtain legal counsel. A recent estimate made by a group in Iowa suggested that 70% of the population of that state did not have enough money to retain the services of an attorney. Because most white collar criminals have learned the applicable law very well before embarking on their criminal careers and many seem to have the active assistance of local civil servants or even judges, attorneys do not see much chance of immediate success before a court and will therefore refuse to represent an indigent litigant on a contingency basis. Furthermore, many attorneys working out of small offices without a major law firm behind them hardly do better in court than *pro se* litigants. Therefore, as the white collar criminals, deliberate abusers of civil rights, unscrupulous business firms, and corrupt public officials become bolder, the victims have no way of protecting their property and livelihoods other than by representing themselves in a lawsuit. Even though an increasing number of *pro se* litigants see the courts as hostile to them and their needs for redress under the law, the flood of lawsuits grows because of the massive increase in the crimes that the current attitude of the courts has engendered.

Missing from the report by the Task Force is any adequate remedy for the actions of judges who adhere to the belief that *pro se* litigants do not deserve full consideration by the court. This can be justified by the self-fulfilling prophesy that *pro se* litigants never win. As a result, many judges believe that any time given to a lawsuit in which a litigant represents himself is

wasted. Therefore, *pro se* litigants really do not win simply because the prophesy that they will lose is self-fulfilling.

B. Remedies That Fail

If a district judge summarily dismisses the civil lawsuit of a *pro se* plaintiff without reviewing any of the facts and writes a short opinion that fails to address the fundamental complaint, indicating that the judge barely knew what issues the complaint addressed, the plaintiff can appeal the dismissal to the court of appeals. In a great many cases, the plaintiff receives a brief affirmation of the district judge's opinion, which also fails to address the issues in the complaint and almost always contains the notation that the opinion cannot be cited as a precedent and should not be published.

The plaintiff can then file an appeal with the United States Supreme Court with near certainty that certiorari will not be denied. Many litigants lack the money to have their petitions for certiorari correctly printed and bound to the satisfaction of the clerk, and others fail to present the legal issues in an understandable manner. Even if all submissions are perfect, however, the petition will almost certainly be denied in favor of appeals that are given considerable publicity in the press, are promoted by major organizations, or are otherwise likely to bring fame and praise to the justices. The problems of ordinary citizens, no matter how devastating to them and their families, are ignored, and they find that they would have little more chance of success in getting a justified complaint before a jury than they would have of winning a lottery.

For example, after the courts in several circuits had summarily dismissed hundreds and perhaps thousands of lawsuits alleging employment discrimination at the complaint stage because the plaintiff had failed to provide enough hard evidence to establish a prima facie case when the complaint was submitted, the United States Supreme Court agreed to hear one of the appeals from the Second Circuit. In *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. (2002), it decided unanimously that it is a gross violation of procedures to dismiss a lawsuit at this stage of the proceedings. Among the points the justices made were that a plaintiff can prevail without establishing a prima facie case at all, that a judge's opinion of whether or not a litigant will prevail before a jury is irrelevant to decision to dismiss a lawsuit, and that it is fundamentally unfair to dismiss a lawsuit before the whole body of facts can be revealed through discovery. While this decision provided the plaintiff with a chance to have his lawsuit heard by a jury on the merits, it affirmed that thousands of litigants whose lawsuits had been improperly dismissed over the many years during which the appeals courts had been violating procedures had been left without any access to justice.

Still more perverse was the continued dismissal of lawsuits at the complaint stage, even after the Supreme Court had denounced this practice. It was well known to the judges guilty of this practice that any subsequent petitions for certiorari citing this issue would be denied on the grounds that the Supreme Court had already decided the issue and would not agree to decide it again. This would leave a litigant no way of redressing violations of his civil rights just because he had the bad luck of coming before a judge who is trying to discourage lawsuits by issuing

non-precedential dismissals at the complaint stage and appeals court judges who affirm decisions of the lower court with a rubber stamp. Citing the clear opinion of the U.S. Supreme Court in *Swiercewicz* v. *Sorema N.A.* would have no effect on the outcome before a judge who assumes that anything filed *pro se* is without merit.

In case of particularly severe violations of the law, procedures, or ethics by a judge, a litigant is limited to filing a complaint with a judicial board established for hearing such complaints. Other avenues of redress are closed off because judicial immunity from civil liability was made absolute during the 1990s, even if corruption or malice motivated the judge's actions. Experience shows that the boards investigating misconduct by judges move extremely slowly, and a litigant has roughly one chance in a thousand of having a rogue judge censured, even mildly.

It can be concluded that a litigant whose lawsuit has been dismissed because of the bias of a judge against him, a class to which he belongs, *pro se* litigants in general, or the kind of lawsuit he has filed has almost no chance of redress, either on appeal or in complaint proceedings against a judge. Human nature clearly dictates that when members of any group are permitted to perform illegal, immoral, and unjust actions against other persons with complete impunity, many of them will do so, some because of laziness, others because of malice, and still others in anticipation of gratuities from a favored party. A *pro se* litigant has no recourse against a judge who does not want his complaint heard due to bias of any kind, and the fact that a judge has the power to deny him access to a jury effectively eliminates an important civil right supposedly guaranteed by Amendment VII of the United States Constitution.

C. Common Experiences of *pro se* litigants

The solutions proposed by the Task Force presume good will by the judges and conformity with the standards of ethics and behavior traditionally held by our society. Unfortunately, in speaking and corresponding with many *pro se* litigants, I have learned that there are common problems that reflect an erosion of human values and are often accompanied by abusive behavior by judges. These problems are less likely to arise when a litigant is represented by a lawyer, whose status as an "insider" in the legal profession might tend to restrain the opposing attorney and presiding judge from improper conduct. Such conduct is difficult for *pro se* litigants to cope with, but it is readily recognized when it occur. Eventually, *pro se* litigants make their opinions of the court public, and the increasing criticism leads to a general loss of faith in courts. The growing dissatisfaction of the public with the judicial system is rooted in the negative opinions developed by many litigants who know they have been improperly or illegally treated. Losing a lawsuit is fundamentally different from being denied due process and a fair hearing, and even *pro se* litigants without formal education in a law school can immediately tell the difference.

The most common complaints by litigants of misconduct by the courts include the following:

1. Perjury Is Tolerated by the Judge

This complaint has been made by the great majority of *pro se* litigants with whom I have spoken. Very often, the false testimony is given by one or more government employees. Even when parts of the testimony are shown to be false, judges continue to give full credence to the witness in the remaining parts

of the testimony. The judge then dismisses the lawsuit of a *pro se* litigant citing the perjured testimony as evidence that the lawsuit has no merit. Usually there are documents in the file clearly showing that the testimony was false, but these are simply disregarded by the judge.

Prosecutions for perjury have become rare to non-existent. Government employees have been given complete immunity for perjury they commit "in the line of duty," even if it is given with malice. Government prosecutors may suborn witnesses to perjury by promising them immunity for crimes they have been accused of. It has even been alleged that government employees can be fired for refusing to give false testimony at the behest of their supervisors. Many cases are known where civil servants have advanced their own careers by deliberately misleading courts, administrative boards, and even Congress to advance a political agenda espoused by the their supervisors.

2. Records Submitted to the Court Disappear from the Files

This complaint has frequently been made. Some litigants note that the entries of the documents are still in the court records but the documents themselves have disappeared. Even if copies of the records are retained by the litigant, they usually cannot be added to a record on appeal unless they are still in the file of the lower court.

3. Judges' Opinions Fail to Address the Issues of the Lawsuit

Many litigants complain that orders for dismissal address issues that were never raised in the lawsuit and fail to address the issues that were. In light of the

fact that most judges have earned a law degree, some decisions have convinced the litigants that the legal issues were deliberately misconstrued by the judge. For example, if a plaintiff seeks injunctive relief pursuant to the Administrative Procedures Act and monetary relief citing the Federal Tort Claim Act, a judge may deny the injunctive relief on the grounds that there are no provisions for such relief in the Federal Tort Claim Act and that the Administrative Procedures Act does not authorize monetary relief. Similarly, a lawsuit alleging failure of the Department of Labor to investigate a discrimination complaint against a private university was dismissed on the grounds that the plaintiff was seeking Federal employment through the courts. Even a law professor from Hofstra University complained in a speech that he was tired of reading decisions that did not address the issues of the case. At best, this means that the law professor was able to understand the issues of the lawsuit from the submissions, while the judge allegedly was not. At worst, this indicates that the judge was deliberately falsifying the issues in order to justify an obviously faulty decision. According to the law professor, after he finished his speech, a judge leaned over to him and said, "You don't know the half of it."

4. Certain Litigants must Always Win

One of the most harmful practices of the courts becomes most evident when statistical surveys of the outcomes of litigation are conducted. Some judges have apparently developed strong biases for or against certain kinds of lawsuit or litigant and lose sight of the fact that each case deserves a separate analysis. The outcomes of these lawsuits most frequently favor government agencies as defendants and major special interest groups, such as the American Civil Liberties

Union, as representatives of a plaintiff. Decisions are reached without jury trial to assure that the favored litigant wins. The trend to summarily dismiss lawsuits without trials is reflected in surveys showing that more than 11% of all civil lawsuits were decided by juries in the early 1960s, while less than 2% reach a jury now.

It is not only the courts that are guilty of denying due process to protect favored litigants. Congress has also established special means of adjudication to remove the proceedings against certain agencies from the normal judicial channels. Some of the agencies established for administrative adjudication have earned a reputation for extreme bias in favor of the government agencies they are supposed to treat impartially. For example, the Merit System Protection Board (MSPB), which adjudicates complaints filed by veterans because their preference rights in the civil service have been violated, has never decided in favor of a veteran in any appeal. The United States Court of Appeals for the Federal Circuit, which is the only court with jurisdiction over appeals from the MSPB, has never decided in favor of a whistleblower, after hearing 71 appeals citing the Whistleblowers' Protection Act. It is also doubtful whether it has ever decided in favor of a veteran, although I have yet to find records on this point. It is noteworthy that under the law, the burden of proof is on the agency, and in the case of appeals filed by whistleblowers, clear and convincing evidence is required, giving whistleblowers a clear benefit of the doubt. Nevertheless, the agency always wins in such appeals, as well as those brought under veterans' laws.

The Veterans' Employment and Training Service (VETS) accepts employment discrimination complaints from veterans. All complaints it receives are not

maintained in the agency files, but of 1029 complaints it did place in its records in 2001, five were brought to the courts, but only one was adjudicated as a civil lawsuit.

Any lawsuits brought by a plaintiff pro per fall into the category of "thousand to one shots," but so do discrimination lawsuits brought against government agencies with the assistance of "B" or "C-class" lawyers. Similarly, civil rights and employment discrimination lawsuits routinely fail, unless a major special interest group supports one of the parties.

Any time lawsuits that depend on an individual interpretation of the facts are decided so preponderantly in favor of one party without the assistance of a jury, suspicion of bias is justified. In conflicts between human beings, rank, job title, or affiliation do not determine which party has followed the law and which party has broken it. If the supervisor prevails one thousand times in whistleblower appeals for every time the whistleblower prevails, it is clear that the adjudication has not been impartial. This conclusion is given great support by the findings of Congress that reprisal against whistleblowers is a problem of massive proportions in the civil service, requiring several amendments to make the Whistleblowers' Protection Act considerably stronger. That the efforts of Congress have been consistently undermined by the judges on the United States Court of Appeals for the Federal Circuit reflects an imbalance that has been developing between the powers of the legislative and judicial branches in recent years.

5. Different Standards Are Applied to Different Litigants

Powerful plaintiffs seek to delay litigation until the opponent dies or is forced to end the litigation for financial reasons. Some well-represented litigants do not respond to the summons until a motion for default has been entered, and judges routinely excuse the failure and refuse to enter a default judgment. The same judges are quick to dismiss lawsuits because a *pro se* plaintiff has missed a deadline by one or two days, even when the cause of the delay was beyond the control of the litigant. The lack of impartiality is plainly evident when one party is permitted unlimited delays, in spite of the fact that the United States Department of Justice or a major law firm with a large staff of lawyers is representing that party, while a *pro se* litigant forced to act alone is held to the strictest standards stipulated in the FRCP and local rules. Allowing one litigant unlimited delays while the other is facing severe financial difficulties as long as the lawsuit remains unsettled is a tactic that clearly violates judicial fairness and at least the spirit of the United States Constitution, which demands a speedy trial in criminal matters and, by implication, reasonable speed in settling civil disputes, as well.

6. Recent Handling of Civil Lawsuits by the Courts Have Instigated a White Collar Crime Wave

Many successful white collar criminals have obtained the cooperation of local courts to defraud private citizens out of large sums of money, often leaving the victim destitute. A few of the methods frequently used include abuse of bankruptcy procedures to loot estates, illegal foreclosures on real

estate, seizure of cash or property without due process, and fraud during divorce proceedings.

Federal courts should have jurisdiction over obvious frauds perpetrated by state courts under the RICO statute and civil rights laws. However, failure of effective action by Federal judges to stop obvious fraud perpetrated by colleagues employed by state and local government encourages larcenous state officials, including judges, to conclude that their positions allow them to illegally enrich themselves at the expense of selected victims with complete impunity.

Litigants who have sought protection from state and local criminal gangs in Federal courts have encountered many years of delays, denial of jury trials, and refusals to issue decisions justified by the facts of the case. Many abuses have come to public attention in recent years, but the crime wave has grown so rapidly, many of the practices have not received sufficient publicity to warn potential victims. Crimes like identity theft, fraudulent foreclosure, fraud in stating fees and interest charges, and abuses of eminent domain have become epidemic throughout the United States. They can financially ruin victims, who have not found effective protection through either criminal or civil procedures.

7. Court Orders Go Unheeded

Failure of courts to enforce their own orders granting relief to litigants may eventually result in more difficulties than adjudicating the initial petition for relief. Plaintiffs may prevail but gain no redress from the decision because judges refuse to issue effective orders mandating the remedies demanded by a jury. This is a problem that often arises when the delinquent party is a government agency. Common

examples of deliberate resistance to court orders include ignoring orders to produce documents requested under the Freedom of Information or Privacy Act and failure of public officials to obey orders to return money or property unlawfully taken from citizens by law enforcement agencies.

8. Judges Give Orders Contrary to Law and Accepted Standards of Behavior

Opposite the failure to enforce just orders for relief is issuing orders demanding illegal or obviously impractical relief from litigants. Examples of practices that have become common during the past few years include demands for support payments from one party to divorce proceedings that exceed the total earnings of the person ordered to pay, jailing of indigent litigants who cannot pay what the court has demanded of them for other reasons, removal of children from their natural parents without due process, and imposition of medical treatment on minor children without informing their parents.

9. Judges Refuse to Take Actions Required by Law

Many routine actions required of judges have created barriers to the enforcement of laws as intended by Congress. An excellent example of this is the action usually taken after a litigant complaints that he cannot obtain documents requested pursuant to the Freedom of Information Act. This law was passed by Congress because of the great resistance shown by Federal civil servants to making their unclassified documents available to the general public. Records created through the use of tax money should belong to the public and be made available on request.

Congress obviously intended that documents formally requested be made available immediately. It therefore specified a waiting period of no more than ten working days and permitted a person who requested the records to file a lawsuit to obtain the documents if the agency is not forthcoming. It requires agencies to assist people making requests to identify the documents and to provide the documents after charging only minimal copying fees.

Obviously, to uphold this law as Congress intended, a judge must order immediate release of the records to the court for distribution to the plaintiff after the court has ruled on any objections the agency has made to their release. Because obtaining records as quickly as possible is often necessary for a litigant to obtain some benefit to which he is entitled, complete an article for publication in a newspaper or periodical, or protect himself of a relative from the consequences of false information about him being distributed with official records, the rapid availability of records is vital.

Instead of upholding the high standards demanded by the Freedom of Information Act, judges have consistently permitted lawsuits to obtain public information to drag on for several years, often making the intended use of the documents impossible. Judges seem to attempt to avoid issuing orders to government agencies, even when the law mandates this. They fail to review contested records in camera, as provided for in the law, and simply hope the plaintiff will eventually withdraw his demand for the documents. Although obtaining documents often costs plaintiffs excessive amounts of money for the litigation, judges seldom offer the monetary relief specified in the law. They also fail to impose the requirement of the law that photocopy fees be reasonable. While private shops

provide photocopies for 5 cents or less, agencies may charge exorbitant amounts to copy their documents. For example, about two years ago, one agency demanded 31 cents for each copy, or more than 6 times the price on the private market.

The failure of the courts to impose sanctions on civil servants who make it a sport to defy the Freedom of Information Act has led to the development of procedures to keep public documents out of the hands of citizens who want to obtain them.

10. Courts Have Become Inconsistent and Arbitrary

Courts have recently begun to establish very confusing precedents, reverse their own decisions, and ignore real issues rather than settling them. In recent years, different Courts of Appeals have issued opposite interpretations of the same law, making one action legal under the jurisdiction of one circuit and illegal under the jurisdiction of another. Because the United States Supreme Court denied certiorari each time a litigant attempted to obtain a definitive decision on some of these matters, Federal law can mean one thing in one circuit and the opposite in another. For example, whether or not Federal law permits factory workers to speak with each other in a language other than English depends upon the area of the country in which the factory is located.

Changing public opinion or even an unusual personal opinion held by the judge to whom the case has been assigned may result in a lawsuit being decided in a manner contrary to other recent decisions in nearly identical cases. When judicial opinions on the interpretation of a law are continually fluctuating because one judge approves of the law while another

does not, whichever litigant loses will feel cheated by the court because other litigants in exactly in the same position won their lawsuits. This situation causes more litigants to risk a lawsuit rather than settling the dispute out of court because winning or losing depends only on the whim of the judge hearing the case rather than on a consistent and unambiguous interpretation of the law. An advantage of being represented by counsel is often the knowledge he brings concerning which judges will be sympathetic to the litigant's case and which will favor the other party. In an impartial system, such considerations would not be a factor. The founding fathers hoped to eliminate this problem by insisting that decisions be rendered by juries, but by increasingly usurping the duties of the jurors, judges have permitted their own beliefs on the wisdom of individual laws to override the stated intentions of Congress. Because all judges do not hold the same opinions, an increasing inconsistency in decisions is becoming an increasing problem for *pro se* litigants and lawyers, alike.

11. Federalism Theory Interferes with Practical Justice

In recent history, Federal courts have intervened in many disputes between citizens and individual states, where the state court system was clearly violating or assisting in the violation of civil rights. Since the first Civil Rights statutes were passed in 1871, Congress has shown a clear intent to place the guarantees in Amendments XIII, XIV, and XV above the limitations on suits against states in Amendment XI. Federal courts belatedly struck down state laws deliberately passed to bar Americans of African descent from voting, attending schools with white children, and using public facilities. These rulings have clearly

focused the attention of the nation on the fact that states are prone to commit actions against their citizens that violate Federal guarantees defined as civil and human rights by our Constitution.

Recently, the theory of federalism has been revived, and Federal courts have become less willing to interfere with the actions of state courts, no matter how unjust and reprehensible. One of the most important reasons for Federal courts to exist is to provide citizens with a final recourse against clearly illegal actions committed by state and local government, which are much more likely to fall under the influence of criminal conspirators than the much more diverse Federal system. If the Federal courts disqualify themselves from settling disputes between citizens and state governments, they have clearly left the citizens vulnerable to losing their civil rights through clearly illegal actions by small, corrupt political machines.

IV. Remedies

What is the court supposed to do?

The basic reason for establishing a judicial system is to settle disputes that are addressed by existing laws. It has been repeatedly stated by experts on matters judicial in the United States that the ultimate goal is to decide all matters on the merits. That means to most reasonable persons that the court should concern itself with two factors and only two factors: the law and the material facts. The blindfold on the statue of Justice is there to keep attention on the scales and not on the race, color, national origin, age, gender, appearance, financial condition, social position, or friends of the litigants.

It stands to reason that a *pro se* litigant has as much chance of being entitled to relief according to the law and the facts as the litigant with enough money to afford the services of the best law firm in the country. The reason everyone who can afford it will seek the services of a class A law firm is that the presentation of the law and facts of the case in the arguments is reputed to sway judges and juries toward the side of one client where the issues are not entirely clear. However, if skill in arguing becomes the sole criterion for determining who prevails in a lawsuit, then the courts have failed in their duty to provide a fully impartial forum for presenting the facts.

The Task Force must address one primary problem: a failure of the court to be impartial. This failure is usually apparent from the outcome of lawsuits. If *pro se* litigants always or almost always lose, then the courts have failed. No class of litigants is right or wrong 100% of the time. If one person comes to the court for revenge after being fired for poor performance, the court cannot conclude that the next person raising the same claim was not fired for failing to become an accomplice to illegal actions his boss is engaged in, for belonging to a race that the boss does not like, or for being too old when the boss wants only youthful employees. If a father must be kept away from children he is abusing, that does not mean that the next father who seeks custody of his children is abusing them as well. If personal property was seized from one person because of his refusal to pay taxes, it cannot be concluded that there is no merit in the lawsuit of the next person who complains that his property was illegally confiscated by corrupt public officials.

As already discussed, *pro se* lawsuits are increasing for several reasons, which have nothing to do with the law or the facts in each individual case. These include:

1) a white collar crime wave encouraged by the failure of prosecutors and judges to focus on anything but violent crime;

2) a breakdown in government accountability resulting in civil servants wasting funds on a massive scale and abusing the rights of citizens;

3) an increasing resistance by large corporations to being held accountable for the harm they do to ordinary citizens;

4) the continual erosion of traditional values, which formerly placed limits on the excesses society would tolerate; and

5) the combination of lower earnings by the average American and the increasing fees demanded by competent lawyers. A strict enforcement of the law and increasing penalties for wrongdoing would do much to eliminate all of these reasons. Misconduct will increase as long as most perpetrators escape all consequences for their actions and penalties remain inconsequential. Supply and demand regulate what lawyers charge and will result in lower fees when the causes for the increasing number of lawsuits are eliminated.

If the courts were functioning fairly and efficiently, the outcome of a lawsuit would be relatively easy to predict according the circumstances and not dependent on non-merit factors. That means that a *pro se* litigant showing that his rights under any law had been violated and that he had suffered some kind of harm

because of the violation would face no reduction in his chances of success because he was not represented by a lawyer. Only the law, which he would not necessarily have to cite correctly, and the facts of the case would determine the outcome. Any reduction in the chances of his success with a meritorious claim would indicate that the court has not fulfilled its function. The Task Force need only focus on a *pro se* litigant's chance of success with a meritorious claim to have performed its duties to the complete satisfaction of all.

If a *pro se* litigant fails to prevail in spite of the fact that his claim is meritorious, the system has failed. The Task Force should seek remedies assuring that each meritorious claim results in the relief prescribed by law regardless of whether or not the litigant is represented by counsel. It should seek a review process by which sufficient attention is given to each lawsuit to assure that the prejudice of one judge cannot perpetrate a miscarriage of justice for any reason. This may well require an increase in the personnel assigned to review each appeal and an increased recruitment of jurors. If so, then Congress should be forcefully informed that increased funding will be required.

It should not be the concern of the Task Force that baseless claims, lawsuits filed to harass, or esoteric challenges to established institutions are not given an appreciable amount of legal aid. It should also not concern the Task Force that jury decisions are challenged by the litigants who do not prevail. However, if almost every lawsuit filed *pro se* is dismissed without a trial, it should be clear that due process is not being provided by the courts.

V. The Solution in the United States Constitution

The Constitution of the United States includes all necessary ingredients for making the courts function fairly and efficiently. In clear and concise English, it is demanded that every person accused of a crime and every litigant in a lawsuit involving more than $20 has a right to a trial by jury. It does not provide for judges substituting their opinions for the decision of a jury of peers. It requires speedy trial of persons indicted for crimes and assures that the common law rights enjoyed by the English colonists at the time the United States declared its independence are respected. Later amendments guaranteed every citizen equal treatment under the law.

Determining whether any claim is meritorious after the facts have been presented belongs to a jury. It is a basic right of every litigant to have a jury decide whether or not he prevails based on the evidence presented. A judge may rig the outcome of a jury trial by refusing to let a litigant present material evidence or by giving false instructions to the jury. However, most complaints by *pro se* litigants result from their being denied any trial by jury at all.

Any litigant, with or without counsel, must provide a complaint alleging that a specific law was violated causing him some form of damage or denying him some right. As an example, we can take the typical outcome of what should be an open and shut case to see whether the Constitution is being followed. The Privacy Act requires correction of false records concerning any citizen, and a citizen files a complaint that an agency is maintaining records about him that he alleges are false. The Court is empowered to review the record

and the evidence that the person presents and order correction or removal of the record. It also authorizes damages to the person who demanded the change and reasonable legal costs. Congress expressed the demand that agency responses be prompt.

In a typical case, the agency would respond to the complaint by claiming various immunities and file a motion for dismissal based on irrelevant claims of privilege and sovereign immunity. The matter would remain on the docket for more than a year without any action being taken, and finally the judge would dismiss the lawsuit. There would be no review of the records by either a judge or a jury, no review of the evidence, no discovery to reveal other relevant matters, and no consideration of the material facts. The judge would simply have assumed that the case would have no merit because it was filed *pro se* and any attention given to it would be a waste of time.

In such a case, there would be no question that the plaintiff alleged a violation of a law and that the law specifically waived sovereign immunity and authorized specific relief. That records existed would not be challenged, and neither would the existence of evidence calling the accuracy of the records into question. What was lacking is a review of the challenged records, a review of the evidence, and an impartial hearing to determine whether the preponderance of evidence indicates that the records are false.

Such a decision would naturally be unpublished, keeping it from the scrutiny of the legal profession, and the judge would enjoy absolute immunity whether or not the decision was in accord with the letter and spirit of the law. It should be obvious that the simple demands made of the judiciary by the Constitution

were not followed. There was no due process, no fact-finding, no review by a jury, and different treatment given to the plaintiff than he would have received if he had been represented by a major law firm or an influential organization. The remedy in this case would be simply for a judge to follow the procedures outlined in the Constitution. The improvement of the treatment of *pro se* litigants would simply entail following the procedures spelled out in the Constitution and in the wording of the Privacy Act, itself. By not doing this, the judge was deliberately producing a chilling effect to keep other citizens from filing lawsuits under the Privacy Act. If any government agent maliciously creates a false record after a dispute with a citizen, the record must remain to mislead anyone who reads in the future. The Privacy Act has therefore been repealed at the whim of one judge without any allegation that the statute violates the Constitution in any way, and it is made clear that the repeal by judicial fiat applies only in the case of the one plaintiff and may be reversed in the next decision if the plaintiff is deemed worthier by the judge. Equal treatment under the law therefore becomes another casualty of the court.

Another example of a failure to meet the Constitutional mandates would be a lawsuit involving employment discrimination based on age. It is evident from the wording of the law and earlier decisions of the Supreme Court that proof of motive is irrelevant in such cases because motive can be implied from circumstances. If a government agency passes over the 50-year-old plaintiff in spite of his 25 years of relevant experience and high examination score in favor of a 30-year-old applicant with three years of experience and a low examination score, the decision should

provide relief for the plaintiff unless the agency can show that there was a valid reason for the choice. However, judges routinely dismiss such cases without a jury trial on the defense of a simple denial by the agency, even though any ordinary person would consider the denial to be without merit and contrary to the fact presented in the documents filed with the court. Again, the decision is unpublished, and appeal results in a rubber-stamped affirmation. With absolute immunity, the judge has nothing to fear even though a clear issue of fact remained to be decided by a jury under the Constitutional formula, and he illegally usurped the functions of the jury to create a chilling effect on the public and thereby discourage other people from filing what he regards as litigation that is too time-consuming.

In the examples given here, no problem exists with the laws cited, the issues are clear, and the relief is spelled out in the statutes. All submissions are timely, and no requirements for further fact-finding are recognized by the judge. The problem for the *pro se* litigants in such cases could not be remedied by better instruction on preparing submissions, assistance of law school students, or more helpful clerks. The problem is the failure of a judge to proceed according to common law and recognize the Constitutional rights of one of the litigants. It could only be remedied by making the judges follow established procedures without allowing their own personal opinions or prejudices to interfere with due process.

VI. The Search for Remedies by the Task Force

The remedies to the problems not addressed by the Task Force involve changing the attitudes of judges toward litigants. While there are people who attempt

to convince the court to make fundamental changes rightfully belonging to the legislative branch and others who use litigation for revenge or to vex an enemy, most people seeking the assistance of a court to settle a dispute do so because necessity demands it. Some people are forced to file several lawsuits because unscrupulous office holders are able to create multiple problems for them, motivated by personal dislike, political disputes, or a desire to obtain a coveted piece of property. The civil rights movement clearly revealed the extent to which officers of state and local government, including judges, are willing to go to violate the rights of individuals because of their political activities or because they belong to certain minorities. Federal courts are the last resort of many people who find themselves robbed of their fundamental rights.

The remedies suggested by the Task Force might be sufficient if all judges and court officials were competent, honest, and incorruptible. If one judge does not live up to the high standards demanded of him, there must be some kind of machinery established to undo the damage he does. However, a litigant soon finds that if he is unfortunate enough to have his case assigned to a less than competent, opinionated, or dishonest judge, his chances for redress of his grievances have been eliminated even before the proceedings start. The eclipse of the jury trial as the main means of settling lawsuits has brought about a preponderance of "fast track" summary judgements, rubber stamped by inattentive appeals court judges, and deemed unworthy of consideration by the Supreme Court. Judges have made themselves impervious to complaints of misconduct and have even provided immunity to anyone employed by any government

agency. The *pro se* plaintiff is therefore left without legal, civil, or human rights for wont of a means of having those rights recognized and upheld.

Short of setting up an entirely new system of courts to pass judgement on the ones we already have, remedies will have to entail a more impartial treatment of lawsuits by judges. A person's social standing must no longer have an impact on a court's decision. The best way of preventing lawsuits from being rigged in favor of an influential or political powerful litigant is to leave decisions to a jury. If individual jurors are biased, there should hopefully be other jurors on the same jury who will hold different opinions. It is also much more difficult to influence 12 randomly selected citizens than it is to improperly influence one judge. Jury trials are made mandatory by the Constitution in most cases, so there is no reason for them to be denied short of a litigant's obvious failure to demonstrate any law that might authorize relief of any kind.

The overriding factor that will eliminate almost all genuine problems faced by *pro se* litigants is a restoration of strict ethics and impartiality to members of the court. If a person's legal rights have been violated, it is an absolute duty of the judge to provide him with a fair hearing and every opportunity to present the evidence that he has. If the judge does this, allows the issues of fact to be decided by an impartial jury, and provides equitable relief to the prevailing party, the recommendations of the Task Force would be sufficient to provide fairness to *pro se* litigants. If, however, any judge fails to live up to his responsibilities, there must be another means of redress provided to correct the injustice created by the court when it denies due process. An oversight body

would have to be sufficiently independent, unbiased, and competent to determine not only the merits of the original lawsuit but also the fairness of the presiding judge. A special grand jury composed of ordinary citizens might be established to pre-sort all lawsuits in order to recommend those that lack merit for early dismissal and refer all others to the judge for trial by jury. It might also be given oversight of the actions of judges that may be prejudicial to one of the parties.

An alternative to this would be to remove all civil immunity from judges. This might result in a flood of lawsuits against judges, but it would be a deterrent to unjustified dismissal of lawsuits prior to jury trial. Aside from obviously doctoring the evidence or giving the jury false information about the laws under which the lawsuit was brought, no failure by the judge could result in his being found liable for misconduct as long as he permitted the decision to be made by a jury.

Other effective remedies might also be found, but it is suggested here that the Task Force should consider the worst case scenario, in which all judges handling the initial proceedings and the appeals fail to perform their duties in the prescribed way. It should then consider the best methods to 1) uphold the litigant's legal rights by overturning the initial decision against him; 2) take action against the judge who rendered the decision to prevent the incident from repeating itself during actions brought by other litigants; 3) hold a trial by jury unless waived by all litigants; 4) provide suitable relief, and 5) see to it that the orders of the court are promptly carried out.

VII. Closing Words

No demands are made here other than that the courts function as close to the system foreseen by the founding fathers as humanly possible. A decision for a lawsuit on the merits with consideration given only to the law and the material facts has become an unattainable dream for the majority of American citizens. Errors cannot be avoided, but it is the duty of all judges sitting on a court to minimize errors to the point that they become extremely rare. Many of the cases tossed out of the courts based on flimsy technicalities involve the life savings, health, or even the survival of one of the litigants. The Task Force is in an excellent position to insist on a review of the court's actions, and it should do so. If bias for or against members of any one group is found, swift action should be taken to correct the injustice. In the long run, it will depend upon the court itself to determine whether or not it wants to bring justice under the law to all people who seek relief from it. If the court takes effective action, the improvement will surely quiet all criticism. If it does not, public indignation is sure to increase to the point that Congress will be required to take some decisive action.

Prepared by
Charles W. Heckman, Dr. Sci.
Submitted in behalf of:
A Matter of Justice Coalition

APPENDIX J: A Nihilistic Government, This United States (political poem)

A NIHILISTIC GOVERNMENT, THIS UNITED STATES

By Don Hamrick (Petitioner)
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Give us this day our daily servilism,
So that actual freedom may never taunt,
The spirit in us, into a future pugilism.
Lest the government forever haunt.
How long?

Henry Hyde confessed that fateful day,
The Constitution, no longer relevant.
'Tis our fault we are slaves today,
We refused to be freedom's adjuvant.
How long?

Our Republican government, overthrown,
By the Department of Homeland Insecurity.
Terrorism, its propaganda, overblown,
Freedom guaranteed by enslavement to security.
How long?

A new mythos proclaimed from this nihilism,
Only deadens our sense of discernment.
From this ethos of paranoia comes this falabilism,
You can't be trusted. But trust the government.
How long?

Deceiving us in a blanket of security,
That we are safe from a world of dangers.
Forever oppressed our sense of responsibility,
To protect ourselves from such harbingers.
How long?

In vain we plead our Second Amendment right
To contest government edicts from on high.
The courts rule our arguments as so much tripe.
They say it does not apply on the thigh.
How long?

Three doors of government slammed shut
Leaving us to agitate for want of freedom.
The rule of law now is anything but,
As we live in this wretched thraldom.
How long?

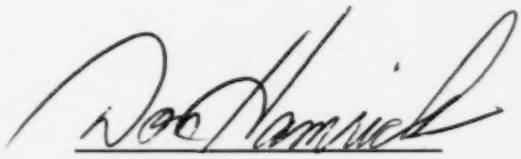
How long will we sit and cower,
Resenting those who act above the law,
Before we stand up for balance of power,
To stop the advancing rape of law.
How long?

Lost to us now our Bill of Rights.
This Nihilistic government frights.
Will it be much longer?

CERTIFICATE OF COMPLIANCE

Petitioner hereby submits his Petition for Writ of Certiorari as compliant with Rule 33.1 of the Rules of the United States Supreme Court.

Petitioner further states the he is a fully documented U.S. Able Seaman in the lawful possession of his Merchant Mariner's Document (I.D card) and is therefore lawfully exempt from prepaying the filing fee in accordance with Rule 40(2) of the Rules of the United States Supreme Court and in accordance with the Seaman's Suit law of 28 U.S.C. § 1916 under Rule 11 in order to assist the U.S. Court of Appeals for the DC Circuit in matters of great public interest.



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